# Supreme Court of the United States.

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LINDSAY & PHELPS COMPANY,

Plaintiff in Error.

vs.

JOHN H. MULLEN, and the STATE OF MINNESOTA,

Defendants in Error.

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## ARGUMENT IN OPPOSITION TO MOTION TO ADVANCE CAUSE.

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Briefly stated, this motion rests upon these facts:

Prior to 1893, a company known as the Mississippi River Logging Company, located and constructed assorting booms at a point on the Mississippi river in Minnesota, known as West Newton, to receive logs cut on the Chippewa river and its tributaries in the state of Wisconsin. The logs come into this boom in a common mass, and are then assorted, put in rafts, and delivered to the owners at the foot of the boom, thence taken to points in the various states for which they are destined.

Also prior to 1893, a law was passed by the legislature of Minnesota, creating lumber districts and providing for the appointment of surveyors general, who were to be paid, not

by the state, but by fees collected from log owners. The general terms of this law are set out in the motion papers.

In April 1893 John H. Mullen was appointed surveyor general for the district in which the so-called West Newton booms are situate, and it is claimed that during the season of 1893 said Mullen scaled large quantities of logs, among others, logs belonging to the plaintiff in error. His fees not being paid, he proceeded to sell the logs of the plaintiff in error, and it brought replevin, which is the suit at bar.

In the winter of 1895, the claim not having been paid, the legislature of Minnesota generously appropriated to Mr. Mullen a large sum of money, conditioned upon his selling and assigning his claim, or alleged lien, to the state. This was done, and the state having thus embarked in the brokerage business, was, at its own request, made a party to the replevin suit, in which it seeks to collect its claim so purchased of Mullen.

Under the law providing for the purchase of this claim of Mullen by the state, the state is to pay back to Mullen all it collects in excess of the amount paid to Mullen for the claim.

Counsel for defendants in error states that this motion is based upon,

1st: Section 949 of the revised statutes of the United States; and,

2nd: Rule 26 of the supreme court, subdivision 7.

Upon the point that the state is a party, counsel admits —as he necessarily must—that the execution of the revenue laws of the state, is not interfered with, but that the state is a party within the meaning of section 949, and that such fact, coupled with the circumstances of the case, entitles the state to have the cause advanced.

As we read section 949, the fact that the state is a party, is immaterial, unless the revenue laws of the state are being interfered with, and that to an extent that seriously embarrasses the administration of the state affairs. That is,

the case must be one where the collection of state revenue is being enjoined, or stayed, to the serious embarrassment of the state, and the state is a party.

*Carter vs. Greenhow, 109 U. S. 64.*

The mere fact that the execution of the revenue laws is enjoined, does not entitle the case to be advanced, unless it sufficiently appears that the operation of the government of the state will be embarrassed.

*Hoge vs. Richmond, 103 U. S., 1.*

That there must be an interference with the operation of the revenue laws to the extent of embarrassing the administration of the affairs of the state, and the state must be a party, is clearly sustained by the language of the court in,

*Central Railroad vs. Bourbon County, 116 U. S., 538.*

We do not think it was ever claimed before, that a party could have a suit advanced, a suit brought to recover,—or a suit in which a party was seeking, as assignee, to enforce—a claim or lien, just because the party happened to be a state. Suppose the state had never become the assignee of Mullen's alleged lien, and the contest were one between Mullen and the plaintiff in error, would it be suggested for one moment that Mullen could have his suit advanced? Was it ever contemplated that section 949 applied to a suit where a state, as assignee of a chose in action was seeking to recover a part of such chose in action? And yet, that is the logic of counsel's contention so far as it is based upon the statute.

## SPECIAL AND PECULIAR CIRCUMSTANCES.

We must admit that the purchase of an alleged lien by a state, and an agreement to attempt its enforcement, and turn back to the assignor all recovered over the amount paid by the assignee, presents a case of special and peculiar circumstances, but not of the nature contemplated by subdivision 7 of Rule 29.

Counsel for defendants in error does not claim that the state is interested any further than, as an alleged creditor, it is interested in the collection of its debt. Nor is there the slightest suggestion that the people of the state, aside from log owners whose logs go through the boom, are in any way interested, beyond the fact that if the state fails to collect its claim, the tax payers will be out that amount; in other words, there is no claim that the general public has the slightest interest in the enforcement or upholding of the law in question. Aside from the state attempting to collect an alleged debt, in this suit, there is no public interest involved. The surveyor general and the log owners are the only ones interested in upholding the validity of this law, and counsel practically concedes that the log owners alone are interested and claims that the law was passed for their protection.

If, in this case, the Boom Company were a party, and the evidence disclosed the fact that the log owners, generally, were hostile to the boom company, and desirous of upholding the law, counsel's claim would have some support, although that would not make the case of sufficient public importance to justify advancing it; but the evidence does not disclose any such condition; on the contrary, it discloses an effort on the part of the log owners to establish a system for the scaling and booming of their logs, and in this suit, to relieve themselves of the burden, annoyance and expense of the interference by the surveyor general, and that their system of managing the booms is quite sufficient to protect their individual interests.

It appears that the Minnesota Boom Company, is a mere name; that the real owners and operators of the booms are the Mississippi River Logging Company and the Chippewa Logging Company (Douglas, pages 56-7, Smith pages 63-4 of record), and that these two companies own two-thirds of the logs coming through the boom.

Plaintiff in error offered to show (page 93) by the evidence of Mr. Weyerhaeuser, that the Mississippi River Logging Company is composed of a number of lumbering interests lumber-

ing on the Chippewa river above the boom in question, and that that company and the Chippewa Logging Company owned about two-thirds of all the logs passing through the boom in 1893.

Plaintiff in error offered to show (page 94 of record) that the owner of all the other logs passing through the booms, including the plaintiff in error, agreed with the Mississippi River Logging Company and the Chippewa Logging Company to sort, scale and deliver their logs.

The plaintiff in error then offered to show (page 102) that of the 500,000,000 feet put through in 1893, all but 120,000 feet came from the Chippewa river and consequently were covered by the management of the boom, or owned by parties to the agreement referred to.

We assume that these offers could have been proven had not the defendants in error objected, and the court sustained the objection, and it comes now with poor grace from the defendants in error, after successfully objecting to our showing these facts, viz., that substantially all the log owners were interested in the operation of the booms as they were operated, to claim the very reverse, and insist that the owners required protection at the hands of the state.

If anything more is required to show your Honors that the log owners are not desirous of the alleged protection, but really desirous to be relieved of the annoyance, burden and cost of the interference by the surveyor general, we refer your Honors to the admission of the defendants in error, page 33:

"Whereupon the defendants admitted in open court, that no request was ever made by the plaintiff, or any one else, that the surveyor general should scale any of the logs running through the boom at West Newton, in 1893."

We might suggest that this admission relates to 1893, because the case involves the alleged scaling for that year.

We have a case, then, where the only interest the state has, is as assignee of a chose in action, to enforce the

collection thereof; the public has no interest whatever, except so far as it may be a simple creditor; and the log owners, in whose interest and for whose protection it is claimed the law was passed, not only are not asking for its enforcement, but opposing its enforcement, upon the ground that it is a useless, expensive interference with their business, and of no benefit to any one except the surveyor general.

We respectfully submit that the case should not be advanced.

Wm. E. Clapp

Attorney for Plaintiff in Error.

# SUPREME COURT OF THE UNITED STATES.

***OCTOBER TERM 1898.***

LINDSAY AND PHELPS COMPANY,

Plaintiff in Error,

vs.

JOHN H. MULLEN and the STATE OF MINNESOTA,

Defendants in Error.

**In Error to the Circuit Court of the United States for the District of Minnesota.**

## STATEMENT OF THE CASE.

This action is replevin. It was brought in August, A. D. 1893, against the defendant in error Mullen, by the plaintiff in error to recover the possession of certain pine saw logs cut upon the Chippewa river in the State of Wisconsin, and on their way to Davenport, Iowa, where the plaintiff in error owned and operated a saw mill; which logs plaintiff claimed to own, and which defendant Mullen had seized. The only right or title claimed by Mullen to the logs, was by virtue of a lien upon them for scaling these logs, and a large number of others belonging to other parties, which lien he claimed under and by virtue of certain statutes of the state of Minnesota hereinafter referred to.

The complaint, after the jurisdictional allegations alleges plaintiff's ownership and right of immediate possession of the

property (describing it,) that it is wrongfully detained by defendant, and the value of the property which is alleged to be $15,000. (Printed record page 1.)

On this complaint a writ of replevin was issued and the property taken by the marshal and delivered to plaintiff (printed record page 2 and 3.)

The answer of the defendant Mullen puts in issue plaintiff's ownership and right of possession of the logs, and their value as alleged in the complaint. It then sets up, in substance,

1. That the defendant was, during the year A. D. 1893, surveyor-general of logs and lumber of the fourth lumber district of Minnesota.

2. That ever since April 16th, 1889, the "Minnesota Boom Company," hereinafter, for brevity, called "Boom Company," had been a corporation duly organized, created, and existing and *chartered* under and by virtue of the laws of the state of Minnesota; that the general nature of the business of said Minnesota Boom Company is and was at all the times herein mentioned, the construction, maintenance and use of booms, dams, and other structures of any kind necessary or advantageous to the performance of the logging and lumbering business upon the Mississippi river, or either branch thereof; also upon or on any side or bank of any slough, bayou, branch, or part of said Mississippi river; also covering the gathering, driving, booming, storing, assorting, rafting, brailing, and otherwise handling logs, lumber and timber of any kind for itself and for any and all persons having logs, lumber or timber upon the waters of said river between the mouth of the Chippewa river, or a point opposite thereto, and the point where the easterly boundary line of the city of Winona meets the Mississippi river, or a point opposite thereto, and also at divers and sundry other places. That this boom company, acting under and by virtue of its *charter duly issued and granted to it by the state of Minnesota*, built, constructed and maintained, prior to and in the year 1893, a large number of booms within the limits of a slough called "West Newton Slough", branching off from the Mississippi river, which slough is wholly within the fourth lumber district of the state of Minnesota, and within the territory describ-

ed in the Boom Company's charter as above set forth, these booms being so built and maintained for the purpose of collecting, gathering, storing, assorting, brailing, rafting and handling logs, timber and lumber as they should come down the Mississippi river from points above in the ordinary course of business. That a large quantity of logs annually pass down the said Mississippi river into and through said fourth district, which logs belong to many different owners, the ownership being in all cases indicated by different marks cut into or upon the logs.

"*That there are and for many months prior to the 17th day of April, 1893, have been and ever since that time have been on file and of record in the office of this defendant, as surveyor general as aforesaid, under and pursuant to the statutes of the state of Minnesota in such case made and provided, several hundred different marks, each of a peculiar and unique character, but distinguishable one from the other and indicating said different ownerships.*"

That the character of the logging business in Minnesota and adjacent states is and has been of such a nature that such log marks are the only way of distinguishing the separate property of the different log owners, and that the logs bearing all these different marks necessarily become intermingled.

That in the practical operation of the business of logging and lumbering, it has been found, as the fact is, that the logs of different owners become intermingled by reason of accident, storms, carelessness, *and particularly the efforts of wrong-doers, who, for the purpose of depriving the true owners of their property and their rights in and to the same, take advantage of the unique nature of the property and seek to and do intermingle the said logs belonging to any one person, firm or corporation, whose property they seek to take or control, with the logs of others.* And that it is neccessary, when logs become intermingled that some person or corporation must assort and separate them; and it is for the purpose of so assorting and separating the logs of the different owners that the Boom Company has built, and maintained, its booms above mentioned, and these booms are properly located and constructed for the purpose of gathering and assorting all the logs that come down the river to that point.

That during the season of 1893 over 500,000,000 feet of logs were passed through these booms, and necessarily they were passed through very fast in order to dispose of them while the season lasted.

That the state of Minnesota, *for the purpose of protecting the people thereof and their rights in and to their property in logs*, and for the purpose of preventing fraud, conversion and wrong-doing, in respect to the selling, handling, booming, measuring, brailing, rafting, gathering and storing of said logs and the ownership thereof, has passed wise and salutary laws for the inspection, scaling and surveying of logs, *and has provided for the keeping of proper public records in respect to the same and the ownership thereof*, and the marking, scaling, surveying and the inspection thereof, and for the better accomplishment of said purposes, and each of them, has divided said state into several districts, and has provided for the appointment of surveyors general in each of said districts to take charge of, measure, and control such inspection, scaling and surveying and has made it the express duty of said surveyors general and each of them, including the defendant Mullen, to inspect, survey and scale logs in the manner provided by law and for the purposes aforesaid, *and has made it the express duty of this said defendant to inspect, survey and scale all logs which might at any time come into the booms of the said Minnesota Boom Company* in said West Newton Slough, as hereinbefore set forth.

It is then alleged, in substance, that where the scaling of the logs is done by the employes of the Boom Company, the amount of the logs sometimes by mistake, and sometimes wilfully, is misrepresented for the interest of the log owners who control the Boom Company.

That the only way to prevent such errors and mistakes as herein set forth, whether the same be intentional or otherwise, and to obtain a true and correct scale of logs passing through said booms, is to have a scale and survey made thereof by some competent, responsible, and disinterested person, whose duty it is to make the same carefully and correctly, and that, realizing this fact, the legislature of the said state has duly passed said laws in relation to surveying and scaling, as herein-

before referred to, by which it is made the express duty of this defendant in his district, and other surveyors general in their respective districts, in said state, to make an official scale and survey of logs coming into such boom or booms of a similar nature within their respective districts, and furthermore, *to keep a true and correct public and official record of all acts done and proceedings had and taken in connection with such scaling*, and that said law has in all respects proved to be of great benefit to the people of this state and of other states.

That all the logs which passed through said booms including plaintiff's logs, were cut on the Mississippi river and its tributaries, and in the ordinary course of business float down the river, and it is necessary that they should be gathered together in some one place and there assorted, brailed and delivered to their respective owners, and scaled, surveyed, measured and inspected, for the purpose, among other things, as aforesaid, of ascertaining the amount of merchantable lumber in each log contained *and keeping a true and correct record, description, and account thereof*, and the ownership and possession thereof for the benefit of the owners thereof. That the booms so maintained by the Boom Company have been recognized and selected as a safe and proper place to handle, assort and measure the logs, and when the owners, including the plaintiff, cut their logs and put them afloat, they knew they would go into these booms for the purposes aforesaid. That the logs ran into and through these booms in such large quantities and with such a diversity of ownership, that it was impossible for defendant to scale them all himself, and he had to employ a large number of deputies and make considerable expenditures of money in order to scale them.

3. That in May 1893 defendant scaled 38,716,510 feet of the logs running out of said boom *in the manner provided by law*, and at the end of said month this defendant duly made out and delivered to the owners of said boom and the managing agent thereof, a true and correct scale bill, stating the date of such survey, the number of logs so surveyed and measured, the marks thereon, respectively, and the number of feet of each mark so surveyed during said month and duly signed the

same under his hand and seal, *and thereupon immediately recorded such bill in the books of his office kept, as aforesaid, all in the manner provided by law*, and before the delivery of such scale bill, as aforesaid, and for the purpose of securing to this defendant the payment of his fees, as provided by law, this defendant duly affixed to said scale bill a true statement of the amount due him thereon, to-wit, the sum of $1,935.32, and that he scaled such logs relying upon such lien, and that he claimed a lien thereon for such amount and the costs of collection. And that he took the logs in question and detained them to secure and enforce payment of his lien therefor.

The answer admits the taking of the several brails of logs mentioned in the complaint, but denies the number of logs and feet as set forth in the complaint. The answer then alleges the manner in which the scaling was done, reciting substantially the requirements of the statutes of Minnesota in that regard; one of the allegations being:

"That every log surveyed by him as aforesaid was so surveyed by the largest number of even feet which it contained in length over ten feet and under twenty-four feet, *and all logs of 24 feet length or more were duly surveyed by him as two logs or more.*"

A similar allegation is made as to scaling 183,062,290 feet of logs in June.

The prayer for judgment is for a return of the property or for the value of the defendant's special property, therein, viz., $12,197.81 and interest (printed record pages 4 to 12.)

A reply to this answer was interposed, in accordance with the state practice. This reply admitted the existence of the West Newton Slough, as alleged in the answer, and that many logs pass through the same annually in great numbers and of many different marks, and many of them are there brailed and rafted as in the reply set forth.

The reply then sets forth that plaintiff is a saw mill owner on the banks of the Mississippi in Iowa, and plaintiff, in common with a number of other saw mill owners along the Mississippi below the mouth of the Chippewa, in Minnesota,

Wisconsin, Iowa, Illinois and Missouri, have found it necessary to secure their supply of logs for manufacture on lands in Wisconsin adjacent to the Chippewa river, from whence they are floated and transported to the mills of the respective owners. It is not practicable to float them down the Chippewa otherwise than loose, nor down the Mississippi otherwise than in rafts or brails, and it has been found more economical for all the owners to co-operate in the business of driving and transporting their logs. In order, therefore, to facilitate and expedite the floating and transportation of their log products to their destination, and solely to aid in the speedy, economical and uninterrupted transportation of the logs from the place where they are cut in Wisconsin to their destination in the several states mentioned, certain of the saw mill owners some years before 1893 organized a corporation in the state of Iowa known as the Mississippi River Logging Company, hereinafter, for brevity, called Logging Co. This Logging Company caused the Boom Company to be organized, hoping to secure authority and sanction from the United States to the Boom Co. to maintain and operate its boom in West Newton Slough, but such authority or sanction was never obtained, and all the booms erected in the name of the Boom Company were in fact erected and are, together with all riparian and other rights there, owned by the Logging Company, and are only maintained by the sufferance of the United States, and are subject to be removed at any time. That neither the said Boom Company nor said Mississippi River Logging Company, nor anyone has ever had any legal right or authority to drive or float into said slough or arm of the river, or to there keep, detain, or hold, in any boom or otherwise, or to there brail or raft any logs of any other person without such person directing or authorizing them so to do or consenting thereto.

To secure further co-operation of logowners, and further facilitate the business, the Logging Company and certain saw mill owners at Eau Claire on the Chippewa, organized another corporation in Wisconsin, known as the Chippewa Logging Company; this latter company purchases all the logs for its respective stockholders, and then divides up the logs so

purchased among its members at Eau Claire, on the Chippewa, and below on the Mississippi, in accordance with an agreed plan, a part of which plan provides for a method of measurement to determine how many logs each member does in fact receive. The arrangements of the Logging Company and the Chippewa Logging Company having been found to be great aids in the speedy and economical transportation of the logs down said rivers, certain individual saw mill owners, at times, hired the said Logging Company to drive or transport logs owned by them down said river to their respective mills. And plaintiff had made an agreement with the Logging Company to drive plaintiff's logs, including those in question, down the Chippewa and to West Newton Slough, and there brail, raft and deliver them to the plaintiff, all of which the Logging Company did, and the logs so delivered are the logs in question in this suit. When the logs were put in the Chippewa River it was expected by all parties interested in them, that they should be, and but for defendant's illegal seizure and detention they would have been, floated and transported to the mills at which they were to be manufactured without delay, stoppage or interruption, except so far as the same might be necessary, to do such acts as should be required in order to float, drive, or transport them safely and expeditiously to their destination. That of all the logs passing through said West Newton slough, at least ninety-nine per cent were and are floated out of said state of Wisconsin down said Chippewa river, and at least eighty per cent thereof were and are destined for and floated or transported to points outside of said states of Wisconsin or Minnesota.

That defendant claims to have been at all the times referred to, one of the surveyors of logs of the state of Minnesota, appointed for the district of which the county of Wabasha is a part, and claims to have scaled or measured said logs, and he took possession of them and held and claims the right to hold them, not only for the fees which he alleged were due for scaling them, but also for the fees which he claimed to be due for the scaling of many millions of feet of other logs in said slough.

That neither the plaintiff, nor anyone having any interest in or control, or dominion over, or any right to such control or dominion of said logs, requested or authorized defendant to measure or scale the same or consented that he should do so, nor did nor does any law of the state of Minnesota give him any right or authority to scale or measure them or any logs passing through said West Newton slough or give him any lien upon them for scaling or measuring them or for scaling or measuring any other logs, nor under the laws or constitution of the United States had or has the state of Minnesota any right, authority, or power nor could it have any authority or power to authorize the defendant or any other state officer, to scale or measure said logs at the expense of the plaintiff or to obtain a lien upon them or detain or hold them for such scaling; that the transporting of such property from one state to another is commerce between the states, and therefore can only be regulated by Congress, and no state can legally in any manner interrupt or interfere with or burden or tax the same.

That the said Chippewa river and the said Mississippi river are, and each of them is navigable waters of the United States, and have been taken control of and are, and for many years last past have been, regulated and improved at great expense by the United States, and the said arm of the Mississippi river called West Newton Slough, is a navigable arm of said river, and neither the state of Minnesota nor any other state past which said Mississippi river flows had or has any right to interfere with the navigation or improvement thereof.

The reply puts in issue, by a general denial, all the allegations of the answer, except as admitted or qualified in the manner above set forth (See printed record pages 13 to 16).

The cause was tried before the court, a jury having been waived by written stipulation.

When the cause was called for trial, the state of Minnesota by its attorney general, appeared and asked that the state be made a party to the action, stating that the state claimed as assignee of Mullen.

Counsel of the plaintiff consented to the granting of said motion, provided the fact that the state of Minnesota has been

made a defendant shall not in any way prejudice any rights that the plaintiff might have in this case if the state of Minnesota had not been made a defendant.

The Court: The state, I suppose, has no claim except as the assignee of the defendant?

Mr. Childs: That is all, as I understand it. I appear for the state and Mr. Edgerton also.

The Court: You may file such papers as are necessary to carry this agreement into effect.

Thereupon the attorney general, on behalf of the defendant state of Minnesota, made and filed the following answer:

STATE OF MINNESOTA.

UNITED STATES CIRCUIT COURT,

THIRD DIVISION.

LINDSEY & PHELPS COMPANY, a corporation, plaintiff,

vs.

JOHN H. MULLEN, Defendant.

Now comes the state of Minnesota and for answer to the complaint of the plaintiff in the above entitled action adopts the answer of the defendant Mullen as its answer, so far as applicable.

Further answering, the state of Minnesota alleges that on the 12th day of February, A. D. 1895, the said defendant, Mullen, duly assigned, transferred, and delivered to the state of Minnesota all his right, claim, and interest in said cause of action against the said plaintiff, and his right to the property described in plaintiff's complaint; that ever since said date the state of Minnesota has been the owner and holder of said claim, interest, right, and title to the property described in the complaint by virtue of said assignment, and is still the owner thereof; that no part of the fees for services rendered, which are fully set forth in the defendant's answer, have been paid to the state of Minnesota.

Wherefore, the state of Minnesota demands judgment for the return of said property, or if that cannot be had, that it

recover from said plaintiff the sum of $12,197.81, with interest, together with the costs and disbursements.

H. W. CHILDS,
Attorney General, and
GEO. B. EDGERTON,
Attorneys for State of Minnesota.

(Printed record pages 21 and 22.)

It will be seen that the pleadings in this case, as well as the evidence and rulings preserved in the bill of exceptions, present three main propositions of law:

First: The defendants contend and the plaintiff denies, that the logs in question, and the other logs for which the defendants claim fees for scaling, were run through a boom "chartered by the laws of the state of Minnesota." The defendants must base their claim for fees of defendant Mullen for scaling these logs and for a lien upon the following laws of the state of Minnesota, viz.:

Section 2 of Chapter 221 of the laws of the state of Minnesota for the year 1889, which is as follows:

> "Any corporation formed under this title, in whole or in part for the improvement of any stream and driving logs therein, or for holding or handling logs therein which shall have taken prior possession of such stream, or any considerable portion thereof, upon which portion no other person or corporation has erected any dams or other improvements, and which may have need of improvement for that purpose, shall have power to improve such streams and its tributaries by clearing and straightening the channels thereof, closing slough, erecting sluice ways, booms of all kinds, side, rolling sluicing and flooding dams or otherwise if necessary. but shall in no case, in any manner, materially obstruct or impede navigation upon such stream or erect any dam or other obstruction below the head of steamboat navigation. Every such corporation which shall so improve a stream and so keep in repair, and operate its works so as to render

driving logs thereon reasonably practicable and certain, may charge and collect reasonable and uniform tolls upon all logs, lumber and timber, driven, sluiced or floated on the same, and may take possession of all logs put into such stream or upon rollways, so as to impede the drive when the owners thereof or their agents shall not have come upon the stream adequately provided with men, teams and tools for breaking the rollways and driving such logs in season for making a thorough drive down such stream without hindering the main drive; and shall also, at the request of the owner of any logs and timber put into said streams, take charge of the same, and drive the same down and out of such stream, or down such stream so far as their improvements may extend, and charge and collect therefor of the owner or party controlling said logs and timber, reasonable charges and expenses for such services. And such corporation shall for all such tolls, costs and expenses have a lien on the logs for which same was incurred, and may seize, in whoever possession found, and hold a sufficient amount thereof to pay the same, and make sale thereof upon giving ten (10) days notice in the manner provided for notifying sales on execution upon the judgment of justice of the peace, or may enforce such liens as other liens are enforced by proper proceedings for that purpose, or may ask, demand, sue for, collect and receive from the owner or owners of such logs the amount due for any such tolls. No injunctional order shall be granted to prevent the use or enjoyment of any such improvement, or abate any such dam necessary thereto unless such corporation shall fail for sixty (60) days after judgment, from which no appeal has been taken, to pay any damages recovered for any injury done by or in consequence of its works. Any corporation formed for the improvement of a stream, which is in whole or in part a boundary between this and an adjoining state, and authorized to drive logs or maintain booms or dams in such stream, shall have authority to purchase and hold stock in corporation or corporations in such adjoining state created for similar purposes up-

on the same stream, or to consolidate or otherwise unite with such corporation or corporations in such adjoining state, whenever the purpose for which the corporation in this state is organized can be better effected thereby. Provided, that no such purchase or consolidation or other union shall be made without the assent of holders of two-third (2-3) of the capital stock of such first (1st) named company. Provided, that all dams and other works erected under the authority given by this act shall be so constructed, used and operated as to facilitate and expedite the driving and handling logs and lumber upon the stream upon which the same may be erected, and the corporation making such improvements hereunder shall have no right to stop logs destined for points below its works on said stream except where dams have been constructed to accumulate water for sluicing logs and flushing the river below the same, and in such case shall not detain logs in any part of the river so as to form a jam or prevent the promptdelivery of logs destined for points below the works constructed under authority of this act."

Section 14 of Chapter 32, of the General Statutes of Minnesota for the year A. D. 1878, being now section 2400 of the statutes of Minnesota of 1894; this statute will be hereinafter referred to as section 2400, and is as follows:

"Each surveyor general, by himself or deputy, shall survey all logs and timber running out of any boom now chartered, or which may hereafter be chartered by law in his district, and at the end of each month when he has surveyed any such logs or timber, make out and deliver to the owner of such boom, or the managing agent thereof, a true and correct scale bill, stating the date of such survey, the number of logs and pieces of timber, the marks thereon respectively, and the number of feet of each mark so surveyed during the month, and shall sign the same; and he shall immediately record such bill in the books

of his office, and, upon being paid his fees for such services, shall deliver the original bill to the owner or managing agent of such boom; and all boomage or fees of such boom on any logs or timber shall be collected in accordance with such survey. And all scale bills heretofore made and signed by any such surveyor general, or the record thereof in the respective offices of such surveyor generals, or copies of such records duly certified, shall, in all courts of this state, be *prima facie* evidence of the matters stated in such scale bill, record or copy."

Section 16 of Chapter 32 of the General Statutes of 1878, being section 2402 of the statutes of 1894; this section will be hereinafter referred to as section 2402, and is as follows:

"The fees of surveyor general shall be: For surveying, scale marking, making scale bills and recording the same and posting in the ledger, five cents per thousand feet for all logs and timber required to be surveyed; for surveying lumber, twenty-five cents per thousand feet; for travelling to perform any service more than two miles from their respective offices, five cents per mile going and returning; for recording any log mark, fifty cents; for making and certifying a copy of any matter which may be of record in his office, or for making any duplicate scale bill, ten cents per folio; for recording any instrument in writing authorized to be recorded in his office, other than scale bills, ten cents per folio, payable when such instrument is presented for record and before it is recorded, and no such instrument shall be deemed to be recorded until it is entered upon the index to the record. And for the purpose of securing to the surveyor general the payment of his fees, whether the same are for traveling, surveying, making scale bills, or recording the same, or for any or all of such services, such surveyor general shall have a lien upon all such logs, timber or lumber surveyed and marked by him, for the amount due for his services thereon, and may retain such lien by affix-

ing to the scale bill of such logs, timber or lumber, before the delivery thereof, a true statement of the amount due him thereon, and that he scaled such logs, timber or lumber, relying upon such lien, and that he claims a lien thereon for such amount, and costs of collection; and thereupon such surveyor general may take actual possession of a sufficient quantity of such logs, timber or lumber, and may retain the same until he is paid the amount due him thereon, and such logs, timber or lumber shall not be removed or taken from the possession or control of such survey general until such payment is made. If the amount is not paid within sixty days after the delivery of such scale bill, the surveyor general may sell at public auction enough of such logs, timber or lumber to pay the amount due him, with the costs of collection first giving ten days' notice of such sale, by posting up five written notices thereof, one in his office, and one in each of the four most public places in the town or city where the sale is to be made; and at such sale the surveyor general may become the purchaser. The sale may be made by the sheriff or any constable of the country, and the only costs of collection allowed shall be ten per cent onthe amount due. for taking care of the property and, to the officer making the sale, ten per cent on the amount payable to the surveyor general."

This question is raised by the assignments of error numbered 1, 2, 3, 4 and 41, which are hereinafter specifically referred to.

Second, If it should be determined that the booms through which these logs ran were "booms chartered by a law of the state of Minnesota" so as to entitle the defendant in error Mullen, to scale the same under the provisions of section 2400 above quoted, then the plaintiff in error claims that section 2402 does not give a lien for the scaling under the provisions of section 2400; and plaintiff further claims that if section 2402 does give such a lien, then the defendants did not

show themselves, or either of them, entitled to any lien upon the plaintiff's logs, because they did not show a compliance with the statute.

This question is raised by the assignments of error numbered 5, 6, 7, 8, 9, 13, 31, 32, 34, 35, 36, 40 and 42, and which are hereinafter specifically referred to.

Third: Plaintiff in error claims that the statutes under which the defendant's claim a right to scale these logs and recover fees therefore, and to a lien on plaintiff's logs therefore, are as applied to the place and business where this scaling was done, an attempted regulation by the state, of interstate commerce, and are unconstitutional and void being in contravention of subdivision 4 of section 8 of article 1 of the constitution of the United States.

This question is raised by the assignments of error numbered 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 33, 37, 38 and 43, and which are hereinafter specifically referred to.

The plaintiff proved the quantity of logs in the various brails, by the scalers who scaled the same. These scalers were all employed by the Chippewa Logging Co. They testified that they scaled all these logs with a Scribner rule, and in the manner required by the statutes of the state of Minnesota, each log being scaled and put down on the scale bills according to its mark, and the various scale bills verified by the scalers were introduced in evidence, and showed the various marks and the number of logs and number of the feet of each mark, the aggregate of each brail being as set forth in the complaint.

Plaintiff also proved its ownership of the logs, and the fact and date of their seizure and detention by defendant Mullen, and their value and rested, (See printed record pages 22 to 33).

Defendant moved for judgment on the ground that there was no sufficient proof of ownership of the property but the court denied the motion (Printed record page 33).

Later in the case, the defendants introduced in evidence exhibit 9 (see printed record page 140). We suppose this was introduced for the purpose of throwing some doubt upon the

question of plaintiff's ownership of the four marks of logs which are shown in this exhibit 9, and which are a part of the marks upon the logs claimed by the plaintiff; and therefore, in rebuttal, the plaintiff offered to show by a witness who was familiar with the marks of the logs that were cut upon the Chippewa river and ran through the West Newton booms, that these marks shown in exhibit 9, were in fact put upon logs cut upon the Chippewa river and belonging to the plaintiff; and the testimony was rejected by the court upon this objection by counsel for the defendants.

"We object to it because it is not competent testimony to prove title, and so far as ownership is concerned, the court has held that ownership has been proved."

The objection being sustained, an exception was taken, and error is assigned upon such ruling. We make this statement at this time so that this court may be advised of the fact, that the question of the plaintiff's ownership of the logs is eliminated from the case.

Specifications of error relied upon by the plaintiff in error:

First: As to the first proposition of law above set forth:

Before introducing any evidence, defendants admitted in open court, that no request was ever made by plaintiff or any one else, that the surveyor general (defendant Mullen) should scale *any* of the logs running through the boom at West Newton in the year 1893 (Printed record page 33.)

Defendants then offered in evidence the articles of incorporation of the Minnesota Boom Company (Exhibit 1, pages 107 to 109 ) and defendant Mullen's commission as surveyor general (Exhibit 2, page 109,) and each of these papers was received in evidence, against plaintiff's objection that they were immaterial, and exceptions to such rulings were taken by plaintiff, and constitute the ground for its first and second assignments of error (printed record pages 33, 149-150-1 and 2.)

It then appearing that the Minnesota Boom Company was a corporation organized under the general laws of the state

of Minnesota, with only such powers as those laws confer, and no claim being made that it had any further "charter," and it having been admitted that the scaling for which defendants sought to recover was not done at the request of anybody, plaintiff interposed an objection to any further proof under the answer, upon the ground that said answer does not state any facts which constitute any defense to this action, and on the ground that the same is immaterial, irrelevant and incompetent; which objection was overruled and plaintiff excepted, and this ruling constitutes the ground for the third assignment of error (see printed record pages 33 and 151.)

Defendants then offered a certified copy of the official oath and bond of defendant Mullen, and the same was received against plaintiff's objection that it was immaterial, to which ruling exception was taken by plaintiff, and this constitutes the ground for the fourth assignment of error (printed record pages 33, 34 and 151.)

The evidence shows that the booms referred to in the pleadings and evidence, consist of a series of structures substantially as follows:

West Newton slough is an arm or minor channel of the Mississippi river, bounded on its southwestern side by the main land constituting the state of Minnesota, and on the other side by an island extending up and down the river about three miles, and dividing this "slough" from the main channel (printed record page 34.) Before this slough was occupied by booms, it was navigable for steamboats (printed record page 56.) Extending from the upper end of this island, diagonally across the river to the Wisconsin shore, is a structure called a shear boom, so arranged that when it is closed it turns all the logs coming down the river into the upper end of the slough; this shear boom is so arranged that one end of it upon being released floats down the stream and allows boats and other water craft to pass, and after they have passed it is arranged to close. (This shear boom and its surroundings' are shown in Exhibit A, page 244 of original record, and it is described more specifically by the witness Douglas on pages 62 and 63 of the printed transcript.)

The logs are thus turned into the upper end of the slough in a common mass which fills the entire slough. At the lower end of the slough, and extending up into it nearly a mile, are the structures which have been erected for the purpose of assorting and brailing the logs. The large map attached to the bill of exceptions, shows a bird's eye view of these structures; they are described in detail and the method of operation given by the defendants' witness Mullen on pages 34-5-6, and Foreman pages 44-5-6, and plaintiff's witness Douglass on pages 56-7. It is sufficient for us to say, that ample and proper arrangements are made for the purpose of assorting out from the common mass, the logs of each owner, and putting them in a receptacle called a pocket, where they are straightened out and fastened together in what is called a brail, which constitutes a section of a raft for towing by steamboats. It is in these pockets, and while the logs are being arranged and brailed, that the scalers do their work of measuring the logs, ascertaining the different marks in each brail and putting down and keeping a record of the marks, the number of logs and number of feet of each mark; as soon as each brail is finished, it is taken down river below the booms a short distance and put with a sufficient number of other brails belonging to the same general owner to constitute a raft; and as soon as this is done, the logs are turned over to their respective owners and taken away in rafts by tow boats.

At the close of the evidence, the plaintiff requested the court to declare as a proposition of law, that it has not been shown that the logs for which the defendants claim fees for scaling in this cause, ever ran into or through any boom chartered by law, and therefore the defendants have no right to the fees claimed, or to any lien on the plaintiff's logs therefor.

This request was refused and the plaintiff excepted, and this ruling constitutes the ground for the 41st assignment of error (see printed record pages 103 and 165.

Second. As to the second proposition of law in controversy here:

It appeared from the defendant's evidence, that the defendant Mullen himself was a practicing lawyer, he never had

any practical experience whatever in scaling logs or lumber up to the time of his appointment as surveyor general, and did not scale personally any of the logs (printed record page 41); and that his chief deputy William Foreman was a farmer, had never lumbered any, never had any experience in handling logs in any way, and did not scale a log, or undertake to direct the men how to scale logs, (printed record page 50.)

Defendant Mullen testified that he took possession of the logs in question under a claim of a lien for scaling or surveying the same, and that that was all the claim he had (printed record page 38.)

The defendants then produced Defendant's Exhibit 3, sample pages of which are to be found at pages 113 to 128 of the printed record, which purports to be a scale bill of pine logs scaled to the mark for the *Minnesota Boom Company* during the month of June 1893 at West Newton boom by John H. Mullen and deputies. This scale bill contained a great number of different marks of logs each day, with the number of logs and number of feet carried out opposite each mark; the number of different marks on many days exceeded 150, while the number of marks of the logs claimed by the plaintiff did not exceed 10 or 15; this scale bill showed an aggregate of 1,265,741 logs, 183,062,299 feet (printed record page 128), which purport to have been scaled by the surveyor general and his deputies during the month of June 1893, being at the rate of about 7,000,000feet every working day of that month.

Defendants also produced exhibit 4, which is a similar document, except that it relates to the scaling of logs in the month of May and shows a total of 254,996 logs, 38,716,510 feet (see printed record page 131).

Defendants also produced their exhibits 5 and 6, which are found in the printed record at pages 133 to 139 inclusive, and which are each addressed "To the Minnesota Boom Company, the managing agent thereof and whomsoever it may concern;" and which notified the parties to whom the notice is addressed, that the defendant Mullen as surveyor general had seized and taken possession of the logs in question, and that said seizure had been made and possession taken by said sur-

veyor general to enforce payment of certain fees of said surveyor general for surveying the logs run out of the boom of the said Minnesota Boom Company during the month of June, 1893, which fees amounted—for the June scaling—to $9,153.10, and—for the May scaling—to $1,935.82. (See record pages 133 and 139).

The defendants proved by their witnesses Mullen and Foreman, that these papers were delivered to one George Scott, who, defendants claim, was the general manager at the boom that season. Mr. Foreman says (printed record page 49) that he served exhibit 3 and exhibits 5 and 6 on Mr. Scott on the 7th day of July, and he also says, that the logs in question were seized by the defendant Mullen some days before the 7th of July.

The plaintiff's witness Chapman, who was in charge of the logs for the plaintiff, says that all of the logs were taken possession of on the 30th day of June (printed record pages 29-30.)

The papers, exhibits 3 and 4, being what purport to be the scale bills, and 5 and 6, being the notices of the taking of the logs and claim for a lien, were each and all received against the plaintiff's objection that they were incompetent, irrelevant and immaterial, all of which objections were overruled, and the plaintiff duly expected. These exceptions constitute the ground for the 5th, 6th, 7th and 8th assignments of error (see printed record pages 40, 49, 151 and 152-3).

The plaintiff, both upon cross examination of the defendant's witness Mullen, (printed record page 43) and upon his direct examination as witness for the plaintiff (page 95) offered to show that neither on the 15th day of May 1893, nor any time thereafter during the period covered by exhibits 3 and 4, was there any mark of logs, or log marks recorded in the office of the surveyor general of the fourth district, in accordance with the provisions of the statutes of Minnesota in relation to the recording of log marks.

On cross examination the objection was made by the defendants that this testimony was not competent, material or

proper cross-examination. The court, however, sustained the objection on the ground alone that it was immaterial (printed record page 43); but on the direct examination of the witness as a witness for the plaintiff, the objection interposed and sustained was, that the testimony was immaterial. To these rulings the plaintiff excepted, and this constitutes the grounds for the 9th and 31st assignments of error (printed record pages 153 and 161).

No other proof of the scaling of these logs by the defendant Mullen, and no proof whatever that the scale bills introduced and received in evidence, were ever recorded in the office of the surveyor general of the fourth district, was introduced or offered by the defendants.

The right and title of the state of Minnesota rests upon defendants' exhibit 8, which is in the words and figures following.

"For value received I hereby sell, assign, transfer, set over and deliver to the state of Minnesota, any and all right and claim of whatsoever name, nature and description for services performed and disbursements made and expenses incurred by me as surveyor general of logs and lumber of the fourth district of the state of Minnesota, and I hereby authorize and fully empower said state to collect the same in any manner which may be deemed best.

"In witness whereof I have hereunto set my hand and seal this 12th day of February, A. D. 1895.

"JOHN H. MULLEN. (Seal.)

"Signed, sealed and delivered in presence of

"C. G. LAWRENCE.

"RICHMOND D. WARNER."

(Printed record page 54.)

The only authority for this assignment, or for the state of Minnesota assuming any interest in or charge of this cause, is found in Chapter 401 of the laws of the state of Minnesota for the year 1895, which is as follows:

"An act for the relief of John H. Mullen, and to appropriate money therefor.

"Be it enacted by the legislature of the state of Minnesota:

"Section 1. That the sum of fifteen thousand eight hundred (15,800) dollars be and the same is hereby appropriated out of any money in the state treasury, not otherwise appropriated, for the relief of John H. Mullen for disbursements made and expenses incurred by him while in the performance of his duty as surveyor general of the Fourth district of the state of Minnesota, in accordance with the instruction of the governor; and the state auditor is hereby instructed to draw his warrant upon the state treasurer for said amount and deliver the same to said Mullen, and the state treasurer is hereby directed to pay the same.

"Section 2. Before said payment is made said Mullen shall assign to the state of Minnesota any and all claims which he may have for labor performed and expenses and disbursements incurred as such surveyor general, and thereupon the state of Minnesota shall proceed to collect the same in the name of said Mullen or otherwise, as the attorney general may direct, and either by actions now pending or which may hereafter be brought. In case the state of Minnesota shall recover more than the amount hereby appropriated the remainder shall be paid over to said Mullen in the same manner as provided by section one (1) of this act.

"Any sums collected by the state up to the amount hereby appropriated shall be paid to the state treasurer and placed to the credit of miscellaneous appropriations.

"Section 3. This act shall take effect and be in force from and after its passage.

"Approved April 26th 1895."

At the close of the defendants' case, the plaintiff moved the court for judgment against the defendants, upon the ground that from all of the evidence in the case, as it now stands, the defendants have failed to show any interest in or lien upon, or right to possess the property described in the complaint.

Among other things, the court's attention was specifically called to the fact, that so far as the June scale bill was concerned, it appeared conclusively from the evidence that it was not made out or delivered to anyone until three or four days after the logs had been seized, while under the statute of the state of Minnesota under which the defendant Mullen claimed a lien, he would have no right to take possession of any property until after he had made out and delivered these scale bills and notice of claim of lien (printed record page 55.)

The court denied this motion and the plaintiff excepted, and this constitutes the ground for the 13th assignment of error (printed record pages 55 and 154.)

The plaintiff in rebuttal called the defendant Mullen, who testified that all the records that he had of the scale bills (defendant's exhibits 3 and 4) were present in court; he produced a book which purported to be a record of a part of exhibit 4; the same was offered by the plaintiff for the purpose of showing that the scale bill, exhibit 4, which had been offered in evidence, had never been recorded in the office of the witness. The copy of the first and last pages of this book are found at pages 141 to 143 of the printed record.

The witness produced a letter press impression book, which he testified was the only record he had of exhibit 3. This book was also offered in evidence for the purpose of showing that no record was ever made of defendant's exhibit 3; no copy of this book is attached to the bill of exceptions, it appearing impossible to make a copy, but the original book has been sent up, and the court's attention will be called to certain pages of it in connection with copies of the same pages of the original scale bill.

The plaintiff proved by E. E. Sinclair, a deputy of the surveyor general of the second lumber district of Minnesota

(being the district in which the marks of all logs cut on the Mississippi river above Minneapolis, are recorded), that certain log marks shown upon exhibit E were not recorded in his office, with one exception which he indicated, and which is the third mark shown upon exhibit E (see printed record pages 97 and 144).

It also proved by F. B. Yates, a deputy of the surveyor general of the first lumber district of the state of Minnesota (being the district where the marks of all logs cut on the St. Croix river and its tributaries are recorded), that none of the same marks as those shown upon exhibit E were recorded in that office, except two, which are indicated on plaintiff's exhibit G, page 146. Mr. Yates' testimony will be found on page 101.

Plaintiff then called Hugh Stewart, who testified that he was employed all the time that the assorting and booming of logs was carried on at West Newton, in the office in charge of the log books, and that before that time he was employed on the other side of the river in the same capacity; and that his duties required him to become and that he had become and was familiar with all the marks that came through these booms in these different years. He was then shown plaintiff's exhibit F (printed record page 145) and testified that he made out the paper, that he got the dates and the marks, the number of logs and the number of feet set forth in the paper, out of the May and June scale bills of the surveyor general—that is, defendant's exhibits 3 and 4—; and that in the performance of his duties, he saw, every year, all of the marks of logs that were turned into the office of the various scalers (see printed record page 98). He was then asked this question:

"Did you ever see any of the marks that are on this exhibit F?"

The defendants objected to the question as immaterial and incompetent.

The Court: What is the object of the testimony?

Plaintiff's Counsel: The purpose of the testimony is to show by this witness and others, that these scale bills, so far as they relate to these logs, which amount to a million feet,

are not only incorrect, but they represent logs that did not go in there at all. There is no such mark of logs going through there.

The court then sustained the objection; to which ruling and order the plaintiff duly excepted.

The plaintiff then offered to show by the witness, that during all the time which he has been employed in the office of the West Newton booms, he never saw any of the log marks set forth in plaintiff's exhibit F; this testimony to be followed by the evidence of the scalers for the Chippewa Logging Company that the logs were not in fact in the brails of logs in which they may appear to be by the tally sheets in the surveyor general's office, and by the evidence of the men who had charge of the catch marking of the logs, showthat these marks were marks that were not known at those booms, and that it was the duty of more than thirty men, if any such marks came to them, to tie it up with a line and hold it until his attention was called to it to give directions where it should go.

The defendants objected to the testimony so offered as immaterial and incompetent, and the court sustained the objection; to which order and ruling plaintiff duly excepted and these rulings constitutes the ground for the 32nd assignment of error (see printed record pages 98-9 and 161-2.)

Plaintiff then called Henry Phitts, who testified as follows:

I live in St. Paul; I am working for the St. Paul Boom Company. I was working at the West Newton boom in the summer of 1893, looking after the sorting, looking after the sorters. I used to look after the logs and see that they marked them right and that they went into the right places. I had to tell the men engaged in the catch marking what to put on them and what bark marks to put on. I gave the same instructions to the men that were stationed at the various gaps to look all the logs over and see that they were properly sorted. There must be upwards of thirty different men stationed at these gaps to perform the same duties. If

a log came to one of these sorters with a mark on it that we have not given here, and one that he is not familiar with he tied it up until I came along. I was there during the entire season performing the same duties all the time, and I had performed these duties before that. I could not tell you how many years I started before 1889. I have been performing those duties ever since the starting of the boom at West Newtown, with the exception of the first year.

Q. I show you plaintiff's exhibit F, and ask you to look at the marks upon that exhibit and see whether you ever saw any of them before?

Defendants objected to the question, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

Plaintiff then offered to show by this witness, that he never saw any of the marks on this exhibit F, and that it would be impossible for the number of logs which is said to have been marked with these marks (which number exceeds a hundred) to have passed through this boom on any one day (as it appears from these scale bills offered in evidence, that they did) without the attention of this witness being called to it, and that they did not in fact pass through there.

Defendants objected to the testimony as immaterial and incompetent, and the court sustained the objection; to which ruling and order plaintiff duly excepted and these rulings constitute the ground for the 34th assignment of error. (See printed record pages 99-100 and 162).

The plaintiff then called James C. Daly, who testified that he had charge, for the defendant Mullen, and was overseer of the scaling of logs; that he had general charge and oversight over the deputies who did the scaling. He was then asked this question:

"Were the men who were employed under your supervision there, men who had worked at scaling logs at West Newton or Beef Slough?"

The defendants objected to the question as immaterial.

The Court: How is that material?

Plaintiff's counsel: I think it will become material by showing that they were not, with some few exceptions, and we expect to show that it is impossible for a man who was not familiar with that work and with the marks there, to make a correct scale of logs.

The court then sustained the objection; to which ruling and order plaintiff duly excepted.

Plaintiff then offered to show by this witness, that there were over thirty scalers employed by the defendant to do the scaling at West Newton during the summer of 1893, and half as many tallymen, and that all the tallymen, with the exception of six, and all of the scalers, were men who were inexperienced and had never had any experience in scaling logs at the West Newton booms, and that by reason of the great number of marks that are rafted together for the Chippewa Logging Company and the Mississippi River Logging Company, it is impossible for an inexperienced scaler with an inexperienced tallyman, to make any correct scale and return of the logs and marks thereon, and that, as a matter of fact, the scales or pretended scales made there by the surveyor general's deputies, were grossly inaccurate.

The defendants objected to the testimony so offered as immaterial and incompetent, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

The witness then further testified:

I have scaled their logs for a number of years. I also scaled the same class of logs on the other side of the river at Beef Slough. I scaled a number of years on the other side, and one year at Beef Slough, so I am familiar with the method of doing the work and the class of work to be done.

The plaintiff then renewed the offer above set forth, and the defendants again objected to the testimony so offered, and the court sustained the objection; to which ruling and order plaintiff duly excepted, and these rulings constitutes the ground for the 35th assignment of error (see printed record pages 100 101 and 162-3).

Plaintiff also called Colin McMillan, who had charge of a crew of deputies or scalers for the defendant Mullen during the summer of 1893. He testified that he scaled some of the logs and had general supervision of the other men. He was then asked this question:

"State whether any of the men under you in scaling these logs scaled all logs twenty-four feet and over in length, as two logs?"

The defendants objected to the question as immaterial and incompetent, and the court sustained the objection; to which ruling and order plaintiff duly accepted, and these rulings constitute the ground for the 36th assignment of error (see printed record pages 101-2 and 163).

After the plaintiff rested its case in rebuttal, the defendant offered in evidence two pages of the book which had been marked plaintiff's exhibit D (the letter press impression book) and which papers were marked A and B.

The plaintiff objected to these two papers as immaterial and incompetent, because there is nothing in these two sheets which is any evidence which the law authorizes or requires the surveyor general to record, and the original papers have already been offered in evidence and are attached to defendant's exhibit 3. Also for the reason that they form no part of the scale bills. Also for the reason that there is no provision for recording such a paper, and the paper now offered in evidence is not in any sense a record; but the court overruled the objection and received the papers in evidence, and copies of the same are attached to the bill of exceptions and marked exhibits A1 and B1, and are found on the printed record page 148.

To this ruling the plaintiff excepted, and this constitutes the ground for the 40th assignment of error.

At the close of the case the plaintiff asked the court to declare, as a matter of law,

"That the defendants have not shown themselves entitled to any lien upon the plaintiff's logs:

"a. Because the scale bills, the defendants' exhibits 3 and 4, are not evidence of the scaling of the logs therein described;

"b. Because it appears affirmatively that the said scale bills were not, nor were either of them, recorded in any book in the office of the surveyor general of that district;

"c. Because it appears that a very great proportion of the logs mentioned in these scale bills, defendants' exhibits 3 and 4, were not the plaintiff's logs, and that the work done was not done at the request of the plaintiff or anybody else;

"d. Because the pretended records of said scale bills were not in fact any record whatever;

"e. Because it does not appear that any of the log marks shown on defendants' scale bills, exhibits 3 and 4, were ever recorded in the office of the surveyor general of logs and lumber of the 4th district of the state of Minnesota in accordance with the provisions of title 3 of chapter 32, General Statutes of the state of Minnesota."

The court refused to do so, to which ruling the plaintiff duly excepted, and this ruling constitutes the ground for the 42nd assignment of error. (Printed record pages 104 and 165.)

THIRD.

As to the third proposition of law above set forth:

The plaintiff proved by the witness Douglass that all of the booms and structures which had been erected in the West Newton Slough were erected by the Mississippi River Logging Company; this work was commenced in 1884, but the sorting works were not put in until 1889. This witness employed all the men, procured all the materials, and paid for both the labor and the materials, and he did this for the Mississippi River Logging Company. He testifies positively that he did not do the work, or any part of it, for the Minnesota Boom Company, and was never employed, in any capacity, by the Minnesota Boom Company.

The witness further testified that the logs that came into the booms of the Mississippi River Logging Company at West Newton in the summer of 1893, came from the Chippewa River, and that about two-thirds of these logs belonged to the Mississippi River Logging Company and the Chippewa Logging Company. That there were several hundred different marks of such logs belonging to the Mississippi River Logging Company and the Chippewa Logging Company, and all of those marks, and all of the logs of those several hundred marks, were put into one pocket or set of pockets as they came through.

He further testified:

Q. How much difference in respect to time and how much difference in the extent of the work and the time to do the work would it have made if all of these marks had had to be sorted separately as other marks were?

"A. I shouldn't think you could do it at all. We would not have room enough; we would not have room to do it.

"Q. Would the delay that would have been occasioned have been such as to prevent getting anywhere near the full amount of logs through in any one season?"

The defendants objected to the question as immaterial, and the court sustained the objection, to which ruling and order plaintiff duly excepted, and this ruling constitutes the ground for the 14th assignment of error (printed record pages 57-154.)

It appeared from the testimony of this witness, that he had general charge and supervision of the assorting of all the logs that came into these booms, and the delivery thereof to the steamboats. He was then asked this question:

"Q. Now I will ask you this question: State, if you know, who, during all the time for the several days set opposite the two marks on defendants' exhibit 9, was treated and recognized by you and the men under you, as the owner of these two marks, and to whom the logs bearing these two marks were delivered?"

The defendants objected to the question as immaterial and as calling for a conclusion of the witness.

The Court: What would the testimony tend to show?

Plaintiff's Counsel: The testimony tends to show that during all of these years, these logs running though this boom, were treated as belonging to the Lindsay & Phelps Company, and to follow it up by showing that no one else has ever made any claim to them, and then we shall offer to show that none of those logs with that mark ever got into that boom.

Mr. Richardson: We object to it because it is not competent testimony to prove title, and as far as ownership is concerned, the court has held that ownership has been proved.

The court then sustained the objection; to which order and ruling plaintiff duly excepted, and this ruling constitutes the ground for the 15th assignment of error (printed record pages 57, 58, 155).

He then testified that during the winter months he worked in the woods for the Mississippi River Logging Company, looking after the quality of the logs that were for that company, and the Chippewa Logging Company, and visited the logging camps that were being conducted by other parties, and saw the marks that were put on their logs, that prior to 1893 he saw, in the course of his travels on the Chippewa waters, logs being put in there bearing some of the marks that are on defendants' exhibit 9; the logs bearing the first two marks on that paper, were being put in for the Lindsay & Phelps Company, and the last mark was cut for the Chippewa Logging Company several years before 1893; and that after he saw those logs up there in the woods, he saw the mark coming through the boom.

"Q. Has any one else other than the Lindsay & Phelps Company ever made any claim there at the boom to any logs bearing either of the two first marks on this exhibit 9?"

The defendants objected to this question as immaterial and incompetent and no foundation laid. The court sustained the objection, to which order and ruling plaintiff duly excepted, and this ruling constitutes the ground for the 16th assignment of error (see printed record pages 58, 155.)

It also appeared from the testimony of this witness, that during the summer of 1893 there were close to 500,000,000 feet of logs rafted out of the boom at West Newton; that there were other places provided for storing these logs besides that part of the West Newton slough that was above the sorting and rafting works, these places being at Minnieska, below the boom, and in Beef Slough and on the Mississippi river on the Wisconsin shore, above the boom; that it would not be practicable to run a boat through the West Newton Slough at the present time; that the government dams shown in exhibit "A" (original record page 244), were built before the booms in question were (printed record pages 58-9.)

Prior to 1889 the work of sorting and rafting the logs that came down the Chippewa river had been done at Beef Slough, Wisconsin. Beef Slough is one of the outlets of the Chippewa river into the Mississippi river, or was at that time. The lower end of that outlet is just below the shear boom that turns the logs into the West Newton boom; the main outlet of the Chippewa river into Beef Slough is about fifteen miles above the main mouth of the Chippewa.

This witness further testified:

We left Beef Slough and went to the Minnesota side of the river to do this sorting and rafting of those logs because Beef Slough got filled up so we could not take logs through. It was necessary to have some other place. We took over to West Newton all of the booms and fixtures that we had used at Beef Slough and entirely abandoned Beef Slough for that purpose (see printed record page 62.)

The witnesses Mullen and Foreman, for the the defendants, had been permited to testify,—against the objection of the plaintiff, that it was immaterial and after counsel for the plaintiff had disclaimed any claim that the defendant Mullen was not entitled to his fees for scaling whatever logs he did scale, by reason of the fact that before he commenced to scale some logs had run through the boom, and had admitted that the parties in charge of the booms objected to his scaling the entire mass of logs in the boom at all times, not only while they succeeded in

preventing it, but afterwards—that repeatedly brails of logs were let out of the different pockets and sent down the stream before the surveyor general's men had finished scaling them, carrying their men down the stream four or five miles, so that they would have to row back against the current and lose perhaps half a day (printed record pages 37-8, 48-9).

The attention of the witness Douglass was called to this statement; he was asked this question:

"Were there any brails of logs taken out of any other pockets and dropped down the river until it was necessary to do so in order to carry on the business there?"

The defendants objected to the question as calling for a conclusion of the witness. The court sustained the objection; to which ruling and order plaintiff duly accepted, and this ruling constitutes the ground for the 17th assignment of error. (Printed record pages 59 and 155).

The plaintiff called Levi P. Smith, and it appeared from his testimony that for 14 years he he had been employed continuously by the Chippewa Logging Company, superintending the scaling of their logs. His duties were performed on the Chippewa river and its tributaries, and at Beef Slough and West Newton; in the winter season he was employed in inspecting and grading the logs, and his work extended over one-half or three quarters of the territory covered by the Chippewa and its tributaries.

(Mr. Douglass had testified that during the years from 1888 to 1893 inclusive, he was engaged in practically the same business as Mr. Smith, his work being confined to the eastern tributaries of the Chippewa; during that time he saw nearly all of the logs that were cut on the eastern tributaries; printed record page 58).

Mr. Smith worked in the territory generally that was not covered by Mr. Douglass; he saw practically all of the other logs that were being put in by other parties in the same streams, and noticed the log marks, and was familiar with most of the marks that were being put upon the Chippewa Logging Com-

pany's logs. During the time the sorting and rafting of the logs was going on, his duties were looking after the scaling at that point, and he himself employed all of the scalers. Previous to 1889, the work of assorting and rafting the logs that came down the Chippewa river, was carried on at Beef Slough on the Wisconsin side, and he was employed in the same capacity at that point.

He also testifies to the manner of scaling the logs, substantially as had been testified to previously by the men who actually scaled them as above set forth, and that the logs that came through the West Newton boom in 1893 came from the Chippewa river and its tributaries in the state of Wisconsin.

He further testified that all of the logs that were cut and and put on the banks of the Chippewa river and its tributaries for the Chippewa Logging Company did not come down to West Newton, that some of them are stopped at Chippewa Falls and Eau Claire, and he gave the names of the parties who were members of the Chippewa Logging Company and who stopped and took out logs at Eau Claire and Chippewa Falls.

Q. You may state how, if you know, these logs are scaled that are taken in by these companies that you named at Chippewa Falls and Eau Claire.

The defendant objected to the question as immaterial.

Plaintiff's Counsel: The object of the testimony is to show that all of the logs of the Chippewa Logging Company everywhere after they leave the banks are scaled for the purpose of enabling the company to make a fair and equitable division among themselves of their property. The property, as will appear by the witness' testimony later on, is acquired by the Chippewa Logging Company from the various members of the corporation in proportion to the amount of money that is contributed to acquire the property; then, as the logs come down the river the proportion of the Chippewa people is taken out, the balance of the logs go on down the river. This is done —and in order to make a fair and equitable division of their logs, the logs are scaled full.

The court then sustained the objection, to which ruling and order the plaintiff duly excepted.

The plaintiff then offered to show by this witness that all of the logs of the Chippewa Logging Company and of the Mississippi River Logging Company which came down the Chippewa river, whether they are taken at Chippewa Falls or Eau Claire by the members of the Chippewa Logging Company, or whether they are assorted and divided among the members at West Newton, are scaled full, that is, without making any deduction whatever for rot, crook, or other defects that may appear to be in the logs.

The defendants objected to such testimony as immaterial.

The court sustained the objection, to which ruling and order plaintiff duly excepted.

Plaintiff's Counsel: I propose to follow this up by the testimony of other witnesses and by the testimony of this witness, showing that the scaling is done in this manner for the purpose of making an equitable division among the members of the Chippewa Logging Company and the Mississippi River Logging Company.

The defendants objected to the offer as immaterial, and the court sustained the objection; to which ruling and order plaintiff duly excepted, and these rulings constitute the ground for the 18th assignment of error (printed record pages 65-6, 155-6.)

This witness also testified, that so far as he knew, every log that went into the West Newton booms in 1893 was cut on Chippewa river. It further appeared from his testimony, that during the year 1893, as well as for a long time before that, the logs had been brought down the Mississippi river from above the mouth of the Chippewa in rafts; that there was a railroad bridge across the Mississippi river at Read's Landing, just below the mouth of the Chippewa, and that it was possible that if a raft of logs coming down from above should be broken up at the railroad bridge, and not picked up there by the steamboat engaged in towing it, it might be driven down into the West Newton Booms.

The plaintiff also called Artemus Lamb, the vice president of the Mississippi River Logging Company, who had held that

office for 20 years, and who was also secretary and treasurer of C. Lamb & Sons.

It appeared from his evidence that C. Lamb & Sons are stockholders in the Chippewa Logging Company, and that the principal business of C. Lamb & Sons is manufacturing logs into lumber, and running steamboats and bringing logs from the Chippewa river and its tributaries to their mills at Clinton, Iowa. That C. Lamb & Sons, as a distinct corporation, carried on a distinct logging business on the Chippewa river during the year 1893, and prior to that time. and sold their logs to the Chippewa Logging Company, which is commonly known as "The Pool".

"Q. I wish you would state the method of doing business by the Chippewa Logging Company from the time that the logs were cut in the woods until they were sorted out of the booms, or wherever they were sorted, and how the division is made between the various members of that company of the logs which belong to that company."

The defendants objected to the question as immaterial and incompetent, as being a question which the the court has already ruled out, and also because this matter is carried out by the books of the company to which the defendants have no access.

The court sustained the objection; to which ruling and order the plaintiff duly excepted.

The plaintiff then offered to show by this witness, in his deposition, that the logs are cut from timber owned by the Chippewa Logging Company by their own men and teams, or by jobbers, and delivered in the waters of the Chippewa, and that they were driven by what is termed a driving company, down to Eau Clare on the Chippewa; that when they got to Chippewa Falls and Eau Claire certain members of the Chippewa Logging Company are entitled to a certain percentage of the logs cut and bought the previous year. It is the custom to take into the booms a certain number of hours or days, and then they are passed down the river for a certain number of hours or days, which is determined by the per cent that be-

longs down the river and by the per cent that belongs at Eau Claire. Then there are scalers appointed by the Chippewa Logging Company for each mill which belongs to the pool. This has reference to the Chippewa Falls and Eau Claire members. They are at the foot of the slip and scale all logs as they come. These logs, then, that belong to the Mississippi River Logging Company are brought on to West Newton, Minnesota, and there they are boomed and rafted by the Mississippi River Logging Company, and are scaled by scalers appointed by the company by the same methods that are used at Eau Claire. The method of scaling at Eau Claire is what is termed the full scale—that is, without making any deductions for defects—and the same thing is done at West Newton—that is, for adjustment between the members of the company, that is, between the Eau Claire people and the Mississippi River Logging Company; that the proportion or percentage of the logs that each member of the Mississippi River Logging Company is entitled to take is arrived at by the amount of the subscription to the original capital stock of the company. It was not subscribed in dollars and cents, but in so many million feet per year; practically in the proportion to their holding in the company; that the method of scaling what is known as the pool logs according to the full scale, is the result of an agreement between all the members of the Chippewa Logging Company and all of the stockholders.

The defendants objected to the testimony so offered as immaterial, and the court sustained the objection; to which ruling and order the plaintiff duly excepted, and these ruling constitute the ground for the 19th assignment of error (see printed record, pages 67-8, 156-7.)

This witness further testified, that in the division of the pool logs among the members of the company—such of them as came down to West Newton and were rafted there—it was not known which particular member of the pool would get any given brail of logs, until the boat arrived there and received them.

The witness was then asked this question:

State what the general rule is as to whether there is a

raft of logs then ready for him to take away from the booms, or whether the boats usually have to wait for the logs to be sorted and rafted after their arrival there, if you know.

This question was objected to as incompetent, immaterial and no foundation laid.

Plaintiff's counsel then called the court's attention to the allegation in the answer charging, in substance, that where the scaling was done by the log owners, or by the parties operating the boom which was controlled by the log owners, the quantity of logs was wilfully increased or diminished in the interest of the owners of the logs, and counsel stated to the court that the object of this testimony was to show that, as a matter of fact, it is impossible to show any such discrimination as is alleged in the answer.

The court remarked that there was no testimony on the part of the defendants to sustain that allegation in the answer, and that the question therefore seemed to be immaterial, and sustained the objection.

No error is assigned upon this ruling, but we think this court's attention should be called to it so as to avoid any impression in the minds of this court, that this allegation in the answer is, or can be in any way true.

The witness was then asked this further question:

"Would it be possible to make a fair adjustment between the Eau Claire and the Chippewa Falls members of the pool company, whose logs are taken out at Eau Claire and Chippewa Falls, and the down river members of the company if the logs that come through the West Newton booms were scaled what is termed straight and sound—that is, by the individual scalers using their judgment in making such deduction as would be necessary to make the logs sound, merchantable logs?"

The defendants objected to the question as incompetent, immaterial, and calling for a conclusion of the witness.

The court sustained the objection, to which ruling and order the plaintiff duly excepted, and this ruling constitutes

the ground for the 20th assignment of error (see printed record pages 71 and 157.)

The witness was then asked this further question:

"How long has the business of these companies been conducted in the same way that it was conducted in 1893, prior to that time?"

The defendants objected to the question as immaterial, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiff then offered to show by this deposition, that the Mississippi River Logging Company had conducted the business in the same manner for twenty-two years, and that the pool had been in existence about thirteen years up to that time.

The defendants objected to the offer and testimony as immaterial, and the court sustained the objection, to which ruling and order plaintiff duly excepted, and these rulings constitute the ground for the 21st assignment of error. (See printed record pages 71 and 157.)

The witness then testified, that the logs had not always been assorted at West Newton prior to 1893; that originally they were handled over at Beef Slough on the Wisconsin side of the river; and he was asked this question:

"And were they handled in the same way there?"

The defendants objected to the question and the court sustained the objection; to which ruling and order plaintiff duly excepted, and this ruling constitutes the ground for the 22nd assignment of error. (See printed record pages 71 and 158.)

It further appeared from the testimony of this witness that the members of what is known as the pool, that is, of the Chippewa Logging Company and the Mississippi River Logging Company, who took logs at West Newton, and prior to the time the West Newton booms were opened, at Beef Slough, were: Youmans Bros. & Hodgins, Winona; Laird Norton Co., and the Winona Lumber Co., of Winona; W. T. Joyce of

Lyons, Iowa; C. Lamb and Sons of Clinton, Iowa; Dimmock, Gould & Co. of Moline; Rock Island Lumber Co. of Rock Island Weyerhaeuser & Denkman of Rock Island; Musser Lumber Co. of Muscatine; Hershey Lumber Co. of Muscatine, and W. J. Young & Co. of Clinton, Iowa,

It also appeared from his testimony that C. Lamb & Sons did not have any logs in the summer of 1893, that were run into the booms at West Newton to be assorted out there, except such as were cut on the Chippewa river or its tributaries in the state of Wisconsin.

The plaintiff then called G. W. Cable, and it appeared from his testimony that he was president of the Cable Lumber Company, a corporation owning and operating saw mills at Davenport, Ia., and carrying on a logging business for the purpose of supplying its mills mainly on the Chippewa river at and prior to 1893, and that that company had logs coming from the West Newton boom in the season of 1893. The witness was then asked this question:

"Did your company make some arrangement or agreement with the Mississippi River Logging Company to scale such logs as they might have coming through that boom that year?"

The defendants objected to the question, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiff then offered to show by the deposition of this witness, that before the business of assorting and rafting the logs at West Newton boom commenced in the summer of 1893, an arrangement was made between the Mississippi River Logging Company and the Cable Lumber Company by which the Mississippi River Logging Company agreed to scale all of the logs of the Cable Lumber Company for a fee which was agreed upon and the Cable Lumber Company agreed that the Mississippi River Logging Company might scale them.

The defendants objected to the testimony, and the court sustained the objection; to which ruling and order plaintiff duly excepted, and these rulings constitute the ground for the

23rd assignment of error (see printed record page 72 and 158.)

The plaintiff then called Frank W. Mueller, who testified that he resided at Davenport, Iowa, was in the lumber business, a member of the firm of Christian Mueller & Sons, and had been connected with that firm since 1879, the business of the firm being saw milling and lumber yards. The witness was then asked this question.

"In 1893 and prior to that time, where did you get your logs to manufacture?"

The defendants objected to the question as immaterial because the deponent is not a party to any of these cases.

The counsel for the plaintiff stated that the object of this testimony, as well as the testimony of several other witnesses, is to show that they were lumber manufacturers in Iowa, and that they cut logs on the Chippewa river and ran them down through these booms for the purpose of supplying logs for their mills.

The Court: It is just as well to show there were two or three, as to show that there were a great many.

Plaintiff's Counsel: I think this is material upon the question of interstate commerce. If all the logs that went in there were subjects of interstate commerce, and had never become a part of the general property of the state of Minnesota, then it must be said that this is a regulation of interstate commerce, and it is for the purpose of raising that question that this testimony is offered.

The court sustained the objection; to which ruling and order the plaintiff duly excepted.

The plaintiff then offered to prove, by the deposition of this witness, that all of their logs during the year 1893 were cut on their own lands on the Chippewa river, or bought on the banks of the Chippewa river and run through this West Newton boom and taken to their mills at Davenport to be manufactured; and the plaintiff offered to follow that testimony by the testimony of a large number of other witnesses that their

logs came through in the same way, and by evidence showing that they were substantially all the logs that did go through the boom.

The defendants objected to the testimony so offered, and the court sustained the objection; to which order and ruling the plaintiff duly excepted, and these rulings constitute the ground for the 24th assignment of error. (See printed record pages 72, 73 and 158.)

The plaintiff then called D. J. Batchelder, who was a member of the firm of Gardner, Batchelder & Welles in 1893, and had charge of their logging business; at that time they were engaged in the manufacture of logs and lumber at Lyons, Iowa. He was asked where this firm got their logs, and the testimony was rejected upon the same ground as that of the Mueller, and an exception taken.

The plaintiff also offered to show by this witness, substantially the same agreement with reference to the scaling of the logs of the firm of Gardner, Batchelder & Welles, that was offered to be shown by the testimony of G. W. Cable above referred to, and this testimony was rejected on the objection of the defendant's and an exception duly taken; and these rulings constitute the ground for the 25th and 26th assignments of error. (See printed record pages 73-4, 158-9.)

The plaintiff then proved a written contract between itself and the Mississippi River Logging Company, for the scaling of their logs, which will be found at pages 74 and 75 of the printed record.

The plaintiff offered in evidence the depositions of William E. Sawyer, George H. Ray and Lucius Coleman for the purpose of showing that the logs of the various lumbering firms and corporations of which these witnesses were officers or members, that came through the West Newton booms in 1893 were cut upon the Chippewa river and destined—all of them—to be taken to the saw mills of the said several firms and corporations located at La Crosse, Wis., Quincy, Ill., and Hannibal, Mo., and that each of these owners made an agreement with the Mississippi River Logging Company to

scale all of their logs that might come through those booms in that year, substantially similar to that between the plaintiff and the Mississippi River Logging Company.

This evidence was objected to by the defendants as immaterial and the court sustained the objection, to which the plaintiff duly excepted, and this ruling constitutes the ground for the 27th assignment of error (see printed record pages 90 and 159.)

Plaintiff also called Mr. Frederick Weyerhaeuser, who testified that he had been engaged in logging and lumbering nearly all of the time since 1856; was president of the Mississippi River Logging Company and the Chippewa Logging Company, and had been such officer since the organization of both companies. He was then asked this question:

Q. "When the Mississippi River Logging Company was organized who were the members of it?"

Objected to as immaterial.

The plaintiff then offered to show by this witness, that the members of the Mississippi River Logging Company—some eight or ten of them in all—were all lumbermen or manufacturers of lumber, residing or having their places of business in the states of Iowa, Illinois and Minnesota, and that the purpose, and sole purpose, of the organization was to facilitate and render less complicated, the driving and handling of their logs after they were put into the Chippewa river, and perhaps the Black river, and that the general course of business of that company has always been substantially that all of the logs that were cut by or for the company were run down the Chippewa River, first to Beef Slough, and afterwards to West Newton Slough, when the work was moved over there; that the logs belonging to the company were all sorted and put in one place under one head, although there were a great many different marks, and that as fast as those logs were sorted out they were divided among the members and taken away by them to their several places of manufacture, according to the interest of each of the members in the company, which interest was determined by the amount contributed by each of the members

in any one year to the fund of the company, which was used in acquiring the logs which it did acquire, and that the logs of the Mississippi River Logging Company and of the Chippewa Logging Company below Eau Claire, constituted at least two-thirds of all the logs that came down that river in every year, including the year 1893.

The defendants objected to the evidence so offered as immaterial, and the court sustained the objection, to which ruling and order plaintiff duly excepted, and this ruling constitutes the ground for the 29th assignment of error (printed record pages 93 and 160).

The same witness was then asked this further question:

"During the year 1893 and years prior to that time, as far back as 1889, you may state whether or not all of the logs that came out of the Chippewa river into the West Newton booms, outside of the logs that were owned by the Chippewa Logging Company and the Mississippi River Logging Company, came there under any agreement or arrangement with the several owners; and if so, what the agreement was."

The defendant objected to the question as immaterial and because the agreement has been shown already.

Counsel for plaintiff stated that the agreement, as far as the cases of Lindsay & Phelps Company, John Paul Lumber Company, and Davidson Lumber Company, has been shown, and I am not asking to show that over again. The propositon is, to show that the Mississippi River Logging Company and the Chippewa Logging Company put their logs in there, and also to show that the other owners of logs, of logs that came in there, agreed with these people that they should take them and put them through their booms, sort them, scale them, and deliver them to them rafted.

Counsel for defendants: A number of depositions have been offered here for the purpose of proving this matter, and they have been excluded thus far as being immaterial.

Counsel for Plaintiff: That is true, and that is the reason I make the offer by this witness, because these depositions do not cover all of the logs.

The court then sustained the objection; to which ruling and order plaintiff duly excepted.

Plaintiff then offered to show by this witness, that all of the logs that came down the Chippewa river and did not belong to the Mississippi River Logging Company or to the Chippewa Logging Company, were turned over to the Mississippi River Logging Company; that there was an agreement by which the company was to drive the logs down the Chippewa boom and assort and raft them and deliver them rafted, to their respective owners at the foot of the West Newton boom.

The defendants objected to the testimony so offered as incompetent and immaterial. The objection was sustained by the court; to which ruling and order plaintiff duly excepted, and these rulings constitute the ground for the 30th assignment of error (see printed record pages 93-4 and 161).

The witness Hugh Stewart testified.

"Q. It appears from the tally sheets offered in evidence in this case, that there was in brail No. 1637 one log marked *Z* M *Z*. You will state whether or not that log was a stray log, as had been defined by Mr. Douglas here.

"A. It was. That log and other stray logs like it, was accounted for to the real owners as follows: The log is posted to the mark; the owner gets the credit for it that way. It is entered up to his credit in the fall and a statement sent to him, and a settlement made if the balance is in his favor or against him.

"Q. Is there, or has there been, any attempt made on the part of the owners of these stray logs to follow the logs themselves and take them out of the brails where they happen to be?"

The defendants objected to the question as immaterial, and the court sustained the objection; to which ruling and order plaintiff duly excepted, and this ruling constitutes the ground for the 33rd assignment of error (see printed record pages 99 and 162).

Witness was then asked the following question:

"Have you made a computation, for the purpose of being able to testify, what proportion of the logs that came through the West Newton boom in the summer of 1893 and the years prior thereto, belonged to parties who resided outside of either the State of Minnesota or Wisconsin?"

The defendants objected as immaterial.

The Court: How is that material?

Plaintiff's counsel: It is material as tending to show the character of the business carried on there, that it was purely and entirely interstate commerce.

The court then sustained the objection; to which ruling and order plaintiff duly excepted.

Q. Have you made a computation so that you can testify as to the amount of logs that were rafted and scaled through the West Newton boom in the summer of 1893 that were not claimed by anybody and that you had no means of knowing to whom they did belong?

The defendants objected to the question as immaterial.

The Court: How is that material?

Plaintiff's counsel: It is material in this way: We expect to show by this witness that out of 500,000,000 feet of logs that came through that summer, all of the logs except 120,000 feet belonged to parties that were engaged in logging on the Chippewa river.

The court then sustained the objection; to which ruling and order plaintiff duly excepted, and these rulings constitutes the grounds for the 37th and 38th assignments of error (see printed record pages 102 and 163-4).

The following stipulation was made in open court:

It is stipulated by and between counsel for the respective parties, that such of the private and local laws or special laws of the state or territory of Minnesota, as either party might desire to call the attention of the court to, should be considered in evidence, and might be read to the court and commented upon with the same force and effect as if formally offered in evidence and made a part of the record.

Counsel for the plaintiff called the attention of the court to the following special laws of the state of Minnesota:

The charter of the Mississippi Boom Company, which is chapter 18 of the Compilation of the laws of 1851-1854;

Charter of the St. Croix Boom Company, which is chapter 29 of the private laws of 1851;

Charter of St. Anthony Boom Company, which is chapter 51 of the Laws of 1852;

Charter of the St. Croix Boom Corporation, which is chapter 141 of the Laws of 1856;

Charter of the Mississippi & Rum River Boom Company, which is chapter 56 of the Laws of 1857. (See printed record page 103.)

At the close of the case, the defendants asked the court to declare as a matter of law

That the statute under which the plaintiff claim a right to scale these logs and recover fees therefor, and to a lien on the plaintiff's logs therefor, is, as applied to the place and business where this scaling was done, an attempted regulation by the state, of interstate commerce, and is unconstitutional and void, being in contravention of subdivision 4, of section 8, of article 1, of the Constitution of the United States.

But the court refused to make such declaration; to which ruling the plaintiff then and there duly excepted, and this ruling constitutes the grounds for the 43rd assignment of error. (See printed record pages 104 and 165.)

## ARGUMENT.

### I.

***The booms at the West Newton Slough, through which the logs scaled by the defendant in error, Mullen, passed, were not, and are not "any boom * * * * chartered by law" (of the State of Minnesta,) in the fourth lumber district.***

This proposition lies at the very foundation of the case of the defendants in error. Unless the booms maintained by the Minnesota Boom Company at West Newton, were "chartered booms" within the meaning of section 2400, the defendant Mullen would have no right to scale the logs in question. And in determining this question, it is to the law itself, and not to what may be set forth in the articles of incorporation of the Minnesota Boom Company—that the court must look.

It is now settled by this court, beyond any possibility of controversy, that anything contained in the articles of incorporation of a corporation organized under the general laws of a state, as was the Minnesota Boom Company, which is not warranted by the statutes authorizing the formation of the corporation, is void for want of authority.

Oregon Railway & Navigation Company v. Oregonian Railway Company, Limited, 130 U. S. 1.

The only law of the State of Minnesota giving corporations of the character of the Minnesota Boom Company any authority whatever, beyond the mere power to be a corporation, is section 2 of chapter 221 of the laws of the State of Minnesota, already quoted.

It was contended upon the argument in the court below, that section 1 of the same act conferred some authority of this kind upon this corporation. Section 1 of the act simply amended section 1 of title 1 of chapter 34 of the general statutes of 1878, by inserting therein before the word "navigation" the words "or other."

Now, section 1 of title 1 of chapter 34, before this amendment, provided that

"Any number of persons, not less than five, may associate themselves and become incorporated for the purpose of building improving and operating railways, telegraphs, canals, or slack water navigation upon any river or lake, and all works of internal improvement which require the taking of private property or any easement therein," and this amendment, inserted before the word "navigation" as above quoted, the words "or other", and it was contended that the holding, handling, assorting and

booming of saw logs is a necessary part of the business of "navigating" the rivers upon which such logs may be floating.

If the legislature had stopped vith section 1, there might possible be some force in this argument, just as there was force in the argument in the case above cited, that the laws of Oregon authorized the organization of a corporation having for its purpose the construction, maintenance and operation of a railroad. But section 2 of the act of 1889, above quoted, prescribed, in the first place, the conditions precedent which must exist in order to empower a corporation to exercise the powers enumerated in that section, and then carefully defined and limited the powers to be exercised by such corporations. It provides that

> "Any corporation formed under this title, in whole or in part, for the improvement of any stream and driving logs therein, or for holding or handling logs therein, *which shall have taken prior possession of such stream, or any considerable portion thereof, upon which portion no other person or corporation has erected any dams or other improvements*", shall have power to do certain things, among others, to erect booms of all kinds.

The section, further on, gives to every such corporation which shall *so* improve a stream, and so keep in repair and operate its works as to render *driving* logs thereon reasonably practicable and certain the right to charge and collect reasonable and uniform tolls upon all logs, etc., *driven sluiced or floated* on the same, and to take possession of all logs put into such stream, or upon the rollways, so as to impede the *driving*, when the owners thereof, or their agents shall not have come upon the stream adequately provided with men, teams and tools for *breaking the rollways and driving* such logs in season for making a thorough *drive* upon such stream without hindering the main *drive*. And also, at the request of the owner of any logs and timber put into such streams, to take charge of the same and *drive* the same down and out of said stream, or upon such stream so far as their improvements may extend. And for such services the corporations are authorized and empowered to collect a toll.

It will be seen that the corporations of this character are *not empowered to take possession of any logs*, except for the purpose of driving. And we think, that without the limitations further on in the section, it is clear that corporations of this character are not authorized to take possession of logs driven out of one stream into another, for the sole purpose of holding, booming and assorting them, which was the sole purpose of these booms.

There is, however, another proposition which seems to us to be fatal to the contention that the Minnesota Boom Company ever acquired from the state of Minnesota any rights on this stream, or that its booms were ever, in any manner, authorized or chartered by any law of the state of Minnesota.

This statute is almost an exact copy of section 1777 of the revised statutes of Wisconsin for 1878, as amended by chapter 318 of laws of Wisconsin for 1882, the only material difference between the two laws being the proviso at the end of section 2, which is not contained in the Wisconsin law, and which seems to have been inserted by the legislature of Minnesota out of extra caution.

The rights and powers of this kind of a corporation were under consideration before the supreme court of Wisconsin in the case of

Black River Flooding Dam Association v. Ketchum, et. al., 54 Wis., 313, and it was there expressly held, that unless a corporation organized under section 1777 had taken, or could take, prior possession of the entire stream, it acquired no rights whatever upon a river under §1777. This decision having been made before the law was enacted in Minnesota, it would seem that it must be conclusive on this proposition.

The Mississippi river, at the point where these booms are erected, is the boundary line between two states, over which each state has concurrent jurisdiction, and one of the great highways of commerce of the United States. It is possible that either state might, in the exercise of its concurrent jurisdiction, by proper legislation, authorize the erection of such booms and structures as those of this Boom Company, includ-

ing the so-called shear booms stretching clear across the river, and forming, when closed, a complete obstruction to the whole river, and all classes of navigation thereon, provided such legislation recognized and protected navigation by steamboats and other water craft. Such legislation, enacted by Minnesota, has been sustained by the supreme court of Wisconsin.

*Keator v. St. Croix Boom Corporation, 72 Wis., 62,* but the boom charter under consideration in that case was a clear and explicit exercise of the concurrent jurisdiction by the legislature of Minnesota, and it made a most careful provision to preserve steamboat navigation; and it seems to us no court could, or would, spell out of this act any intent on the part of the legislature to authorize corporations organized and acting under it alone, to take possession of the Mississippi river at this point and erect booms, of the character, extent and magnitude of these. This view is enforced, it seems to us, by the following language contained in §2:

> "Any corporation formed for the improvement of a stream which is, in whole or in part, a boundary between this and an adjoining state, and authorized to drive logs or maintain booms or dams in such stream shall have authority to purchase and hold stock in corporation or corporations in such adjoining state, created for similar purposes upon the same stream, or to consolidate or otherwise unite with such corporation or corporations in such adjoining state, whenever the purposes for which the corporation in this state is organized can be better effected thereby;"

Which clearly implies, that in case of boundary streams, it would be and is impossible to obtain such prior possession of the stream as the act requires, by a corporation organized under this act, and acting only under its authority. But whether this corporation could obtain prior possession of a boundary river, without uniting with a like corporation formed in the adjoining state, or not, it is clear that it was not intended by this act to confer any power upon this class of corporations to take possession of the Mississippi river below the

mouth of the Chippewa river, and interfere in any manner with its commerce.

It is questionable whether an act of the legislature of the state of Minnesota, which in terms undertakes to confer any such power as this corporation, by its articles of incorporation, assumes upon the Mississippi river at that point, could be sustained under the commerce clause of the constitution. Certainly no such question is presented here, because Sec. 2 of Chapter 221 provides that such corporations

> "shall in no case in any manner materially obstruct or impede navigation upon such stream, or erect any dam *or other obstruction* below the head of steamboat navigation;"

And further provides that

> "all dams and other works erected under the authority given by this act, shall be so constructed, used and operated as to facilitate and expedite the *driving* and handling of logs and lumber upon the stream upon which the same may be erected; and the corporation making such improvements hereunder *shall have no right to stop logs destined for points below its works on said stream, except where dams have been constructed to accumulate water for sluicing the logs, and flushing the river below the same*; and in such case, shall not detain logs in any part of the river so as to form a jam, or prevent the prompt delivery of logs destined for points below the works constructed under the authority of this act."

It would therefore seem to be clear that this law was not passed with a view to authorizing the maintenance of assorting booms, but solely with a view to authorize the formation of corporations who should facilitate, the business of driving and floating the loose logs down the streams to some place where they could be stopped and assorted. And these views of the law are enforced, not only by its terms—to which attention has already been called, but by the fact that when the Minnesota Boom Company was organized, this law was not in existence, and it could not have been contemplated that it would

acquire any power to do what is necessary to be done in order to operate such booms, from any law in existence at the time it was organized. Its articles of incorporation bear date April 5th, 1889, and were recorded the next day (see printed record pages 108-9.) The act of 1889, which it is claimed confers these rights upon this company, was passed and approved April 24th, 1889.

It is true that section 3 of this act provides that it shall apply as well to corporations organized for the purposes therein specified, before the passage of the act, as to those organized afterwards. But, if the purposes of the organization of the Minnesota Boom Company, as stated in its articles, are foreign to or in excess of the powers conferred by this act, then this section cannot help out or affect the Minnesota Boom Company.

It was also urged upon the argument in the court below, and possibly may be again urged here, that the business proposed to be done by the Minnesota Boom Company was a "lawful business," and therefore authorized by title 2 of chapter 34 of the general statutes of Minnesota for the year 1878; but this contention will be seen to be without force, when the court's attention is called to the fact that title relates entirely to corporations empowered to take private property for public use, and the class of corporations which is therein referred to and authorized, comprises all corporations of a quasi public nature; and it is title 1, and not title 2, of which chapter 221 is amendatory. On the other hand, title 2 is entitled "All corporations for pecuniary profit, other than those named in title 1"; that is, corporations for purely private enterprises; the first section in title 2, is section 109 of chapter 34; it is very long and relates to and authorizes the organization of corporations for almost every private purpose under the sun, but no one of the purposes therein referred to, or the kind of business therein authorized to be done, is ever done by quasi public corporations, except as merely incidental to their other business.

But we insist further that the words "any boom chartered by law", found in section 2400 of the statutes of Minnesota, do

not relate, and were not intended to relate to these booms, or to booms erected at that point for that purpose. We note, in the first place, that the language refers to a structure, and not to the corporation owning it.

The first provision of this character that we can find in the laws of Minnesota, is in Chapter 16 of the territorial laws of 1854. Section 10 of that act reads of follows:

> "Section 10. And the surveyor general or his deputies shall survey all logs running out of any boom now chartered or which may be hereafter chartered by law in their districts, when requested so to do, and the said boom owners shall collect their fees according to his scale; and whenever any logs are sent from any boom to the owner thereof, the surveyor shall send therewith and by the person having charge of such logs two tickets or bills containing the number of logs, the number of the raft, and the marks; and the person to whom such logs are sent, or his agent, shall acknowledge thereon the receipt of the whole, or such part thereof as he may receive, and one of said tickets or bills so receipted he shall return to the surveyor general by the person delivering said logs; and such ticket or bill so receipted shall be evidence of the delivery of said logs."

At the time this law was enacted, there were in existence four special acts incorporating boom companies, as follows:

Mississippi Boom Company, Chapter 18, Private Laws of 1851.

By section 2 of this act, this company was authorized to maintain a boom or booms at such points between the Falls of St. Anthony and the town of St. Paul, as they might select, "and in which *all logs and hewn timber coming down said river, shall be gathered by the said company*, and such logs or timber, shall not be retained in such boom, by the said company for a longer period than thirty days, unless otherwise agreed by and between the owner of such logs or timber and the said boom company."

By section 4, the company was required to sort, raft, and deliver the logs in a certain way; and by section 5, to charge fifty cents per thousand feet for so doing; section 8 contained the following provision:

"All logs or other timber passing through said boom, shall be scaled according to the pine scale, now used and known as the St. Croix pine scale, and the charges made according to said scale."

Section 8 of this act was amended in 1854 by chapter 2 of the laws of 1854, so as to contain the following provision:

"All logs or other timber passing through said boom, shall be scaled by some competent person, to be selected by the said company, when there is no authorized surveyor of lumber in office in the county or counties in which said boom is, or may be located, and computed according to the pine scale now used and known as the St. Croix Pine scale or such other scale as may be provided by law."

St. Croix Boom Company, Chapter 29, Private Laws 1851.

This act, in sections 11, 12 and 13, contains similar provisions to the act incorporating the Mississippi Boom Company, except that these booms are located upon the St. Croix river.

St. Anthony Boom Company, Chapter 51, Laws 1852, page 115 laws of Minnesota 1851-4.

This act contains substantially the same provisions as all the others. See sections 11, 12 and 13.

It will be seen that the provisions of section 10 of chapter 16 of the laws of 1854 above quoted, were principally for the purpose of furnishing evidence to the boom company of the delivery of the logs to the person to whom they were sent. The surveyor general was probably authorized by section 11 of this act, to charge five cents a thousand for making this scale, but he was given no lien whatever on anybody's logs for any scaling.

The next enactment, in order of time, upon this subject, is chapter 80 of the laws of 1858, which is entitled "An Act to regulate traffic in logs and lumber." Section 4 of chapter II of this act is as follows:

> "Sec. 4. It shall be the duty of the surveyor general by himself or deputy, to survey all logs running out of any boom now chartered, or which may hereafter be chartered by law in his district, and at the expiration of each week, to make out and deliver to the owner or agent of such boom, a bill stating the number of logs, the mark or marks thereon, and the number of feet of each mark, a copy of which bill he shall enter upon the books of his office, and the original duly certified by him, he shall deliver to the said boom owner or agent, *who shall collect the boomage, or fees of said boom in accordance with such survey.*"

It is clear from this act, that the object of it was to furnish to the boom owners some official determination of the amount of logs upon which their boomage or fees were to be computed. Nothing in this act gives the surveyor general any lien upon any logs. At the time this act had been passed, the following additional boom companies had been incorporated, viz.:

St. Croix Boom Corporation, chapter 141, laws of 1856. This act repeals the acts incorporating the St. Croix Boom Company.

The booms are located substantially at the same places.

Section 13 provided, among other things, that all logs or timber coming down the St. Croix river should, *for the purposes contemplated by the act, be deemed to be in possession of the said St. Croix Boom Corporation when said logs or other timber shall float or be driven below Rock Island*; but the owners of such logs or timber shall when the water shall permit, drive all drives of logs down to the upper end of said upper boom, or as near thereto as the logs in said boom will admit; and all logs coming down Apple river shall be deemed to be in

possession of said corporation for like purposes, when said logs shall float or be driven below Titcomb's Landing."

Mississippi & Rum River Boom Company, Chapter 60, Laws 1857, extra session.

This company was authorized by section 12 of the act, to construct and maintain a boom or booms "at such points as they may think advisable, between the mouth of Crow river and a point four miles above the Falls of St. Anthony, so-called, at which point the St. Anthony boom terminates, and any point within five miles of the mouth of Rum river, *which booms shall be sufficient to hold all logs or other timber that may float down the Mississippi and Rum rivers* and the said corporation *shall* collect all logs and other timber which shall be assorted according to their several marks, and well rafted with good rigging, and be delivered at or near the foot of said booms to owners of such logs or timber, or to such person as said owners may designate."

Section 14 of the act authorized the company to collect a boomage charge of sixty-five cents a thousand feet. There is nothing in the act making any provision whatever for scaling.

It will thus be seen, that at the time of the passage of Chapter 16 of the laws of 1854 and Chapter 80 of the laws of 1858, there was no provision of law by which the amount of the charges of these several boom companies could be officially determined, and we cannot find any act prior to Chapter 16 of the laws of 1854, creating the office of surveyor general, or defining his duties.

The next amendment of this law is section 2 of chapter 74 of the laws of 1862, which reads as follows:

> "It shall be the duty of the surveyor general by himself or deputy, to survey all logs and timber running out of any boom now chartered or which may hereafter be chartered by law in his district, and at the end of each week when he shall have surveyed any such logs or timber, to make out and deliver to the owner of such boom or the managing agent thereof, a true and

correct scale bill, stating the date of such survey, the number of logs and pieces of timber, the mark or marks thereon respectively, and the number of feet of each mark so surveyed during the week, and shall sign the same; and he shall immediately record such bill in the books of his office, and upon being paid his fees for such services shall deliver the original bill to the owner or managing agent of such boom, and all boomage or fees of such boom on any logs or timber shall be collected in accordance with such survey."

And this act is the law now, except that by Chapter 18 of the laws of 1877, periods at which scale bills were to be made out, were extended from one week to one month, and the last clause of the section, making the scale bills evidence, was added.

Referring now to the several corporations which were in existence at the time of the passage of chapter 16 of the laws of 1854, and chapter 80 of the laws of 1858, and chapter 74 of the laws of 1862, it will be seen that each of these companies was authorized absolutely to take possession of all logs and hewn timber that came down the respective rivers into their booms, and to assort and raft out and deliver to the respective owners, the logs so taken possession of; the owners of the logs had no volition in reference to this matter, nor could these companies be held liable for any obstruction or detention of such logs, unless they were guilty of negligence in the performance of their duties.

Again, each one of these companies was authorized to charge a certain sum of money per thousand feet for all of the logs delivered out of their booms, and it was quite necessary that they should be furnished with some *prima facie* evidence, at least, of the amount of logs so delivered.

The utmost that can possibly be claimed with reference to the Minnesota Boom Company and kindred corporations, is that such a company might maintain upon its own premises, a boom for the assorting of its own logs, and the logs of such other owners as might agree with the company that they should be there detained and assorted; and such agreement could very

well include an agreement as to the method of determining the amount of logs handled, and by whom such determination should be made.

And such rights and powers under such agreements, were all that were ever claimed or exercised, either by the Minnesota Boom Company or the Mississippi River Logging Company in the name of the Minnesota Boom Company.

Proof was offered to show this to be true, and rejected, and such ruling constitutes the grounds for the 19th, 23rd, 24th, 25th, 26th, 27th, 29th and 30th assignments of error.

The corporation acquires from the state no right to boom and assort these logs; whatever right it acquires is from individuals, and it cannot be claimed that the intention of the statute under consideration, was to include within its terms such booms as these, under the definition of a "boom chartered by law." But, on the contrary, the statute was directed to corporations chartered by special act such as are above referred to—and each and all of which were given the right, within their respective territories, to take possession of all the logs that came down the river, without reference to any volition on the part of the owners thereof. This contention is further strengthened by the language of section 2400 above quoted, which provides that "all boomage, *or fees* of such boom on any logs or timber, shall be collected in accordance with such survey."

The use of the word "fees" would be very unusual with reference to the compensation of any person or persons who do not have a public, or semi public character. This goes to show that by a "chartered boom" is meant one which has been accorded quasi public duties, for which its owners have received special rights of compensation resting on public authority.

Title 5 of Chapter 32 of the statutes of 1878, which now appears commencing with section 2422 of the statutes of 1894, seems to provide for the operation of booms other than chartered booms, under the heading "Side booms." Section 2422 provides for the method of constructing side booms, and provides for the scaling therein, at the request of the owner of the boom, of all

logs belonging to any party other than the owner of the boom, and an appraisement thereof by the surveyor general, at the request of the owner.

II.

***The statutes of the state of Minnesota are not intended to, and do not in fact, give the surveyor general in any district, any lien upon the logs of private parties for scaling logs which run through chartered booms.***

From the very beginning of the legislation providing for the fees of surveyor general, and specifying his duties, two distinct lines of duty for the surveyor general as to the scaling of logs, appear to have been prescribed, which arise from different circumstances, in the interest of different persons, and to accomplish different purposes. These distinct lines are set forth in sections 11 and 14 of title 3 of chapter 32 of the statutes of 1866 and 1878. Section 14 has been already quoted; the other section is now found as section 2397 of the revised statutes of 1894—and will be hereafter referred to under that designation—and is as follows:

> "The surveyor general, by himself or his deputy, at the request of the owner of any logs, timber or lumber, or of any sheriff, coroner or constable, who has replevied, attached or levied on any logs, timber or lumber, or of any person who has a written order from the owner for the delivery of any logs, timber or lumber to repair to any part of his district and survey such logs timber or lumber, and, upon completing such survey, to make out a true and correct scale bill thereof, stating the person by whom, the time when, and place where such logs, timber or lumber was scaled, at whose request and to whom scaled, if to any one, and the scale mark placed thereon, the number of logs, and, when requested by the owner or any other person controlling the same, the number of pieces of logs or timber, together with the mark or marks thereon, and the number of feet therein contained, and shall sign the same; and

thereupon he shall record such bill in the books of his office, and, upon being paid his fees for such services, he shall deliver the original bill to the person to whom the logs, timber or lumber is scaled, if any; if not, then to the person requesting the survey; and such bill and the record thereof shall each be *prima facie* evidence of the facts therein stated. No surveyor general or deputy surveyor shall in person survey any logs, timber or lumber owned wholly or in part by himself, but either may survey any such logs, timber or lumber, owned wholly or in part by the other; provided, that where logs which have been cut in any lumber district in this state have been run out of said district, it shall be lawful for the surveyor general of the district in which said logs were cut, when requested so to do as above provided, to scale said logs, by himself or deputy, and record the scale bill thereof in the books of his office; and said scale and record thereof shall be received as of the same degree of evidence as if the same had been done in his own proper district."

The purpose of section 2397 is indicated in the clause following the completion of the statement of the duties of the surveyor general: "And such bill and the record thereof, shall each be *prima facie* evidence of the facts therein stated." One of the facts to be stated in the scale bill, made under this section, is "the scale mark placed thereon," clearly indicating the duty of the surveyor in making a scale at the request of the owner, to place a scale mark upon the logs. The significance of the scale mark referred to in section 2397 is shown by referring to section 2401 of the statutes of 1894 (which was section 15 of chapter 32, general statutes of 1878), which provides that in cases of sales or transfer of logs or timber by one party to another, the surveyor general who surveys the same shall, at the time of making such survey, place upon each of such logs the scale mark of the purchaser or other transferee, and "thereupon such scale mark shall supersede all prior marks upon such logs and timber," and become and be the log mark of such purchaser.

The purpose of section 2400 is indicated in the clause which follows the completion of the statement of the duties of the surveyor general, as therein set forth: "And all boomage or fees of such boom on any logs or timber shall be collected in accordance with such survey."

The clauses quoted are the key to the meaning of each of these sections, and, analyzing the sections, we see, as indicated by these clauses, that section 2397 provides for an official scale of any certain lot of logs, timber or lumber which the owner may wish to have certified to; while section 2400 merely provides a scale in accordance with which the owner of a boom may collect charges for handling a certain mark of logs which the law has given him a right to collect.

Section 2397 provides a scale upon a certain limited quantity of logs, timber and lumber, probably of various and miscellaneous marks; section 2400, a scale not limited as to quantity, but on all the logs of each particular mark which run through the boom in a certain space of time. The scale called for in section 2397 may be had by the "owner of any logs timber or lumber," etc., by making a *request*; the duty of the surveyor general does not begin until such request has been made. The scale provided for in section 2400, can be had by the owner of a boom, whose request takes the form of procuring a charter from the state, by which he shall be permitted to collect boomage from all logs passing through his boom; *until* such a charter has been procured, the law provides no means by which he can secure this scale of the surveyor general; *when* such a charter is procured, the surveyor general's duty becomes effective at once.

The purpose of the law being indicated by the phrases first quoted, makes it plain that two different sorts of scale are intended for the benefit of parties who, under these two different circumstances, need an official scale for the convenient transaction of their business. There is nothing to indicate any purpose relating to other parties than those thus interested in either of these directions. The phrasing in other sections of the law, bears out this construction.

In section 2402, fees for the surveyor general's services

are provided, with a lien for their enforcement, "5 cents per thousand feet for all logs and timber *required to be surveyed*," i. e., by request from owner of the logs, or, by the owner of a boom procuring a charter for the collection of boomage.

Section 2404, provides that the surveyor general "*shall not be required* to scale any logs to any other person than the owner."

Section 2412 provides, that in all cases the fees shall be paid by the "party *for whom* the logs are scaled," i. e., at whose request and for whose benefit.

Again, there is no reason for supposing that section 2402 (the section which provides for the lien) is intended to apply to the scale called for in section 2400, except that it is the only paragraph in which the amount of fees is provided for; otherwise the language of the section conforms with that of sections 2397, 2401, 2404 and 2412, all of which imply, or expressly require, a request by the owner of the logs, and imply that the scale is for the benefit of the party making the request.

To construe the law so as to permit the seizure and scale of the logs to collect fees for the boom scale, implies—indeed, it is expressly asserted in this case—that you may seize one man's goods for the debt of another man, for in fact it never happens that a boom company owns any considerable quantity of the logs which pass through its booms.

Take the case at bar. According to the notice served by the surveyor general, he has seized and claims to hold, of the Lindsay & Phelps logs, 1,316,510 feet, to pay his fees for scaling 221,778,800 feet, amounting to $11,088.42, thus putting his entire lien on .006 of the logs scaled. His fees for scaling the logs actually taken, would have been only $65.82.

This would mean that the statute could require a log owner to pay boomage to a boom company, enforceable by a lien (for the law applies only to chartered booms), and then give the surveyor general a lien on yet other of his logs to enforce a bill against the Boom Company for scaling, not alone

his logs, but chiefly those of others. If the owner has paid his boomage, he has paid for the boom scale of his own logs, that being one of the elements in the cost of boomage.

So that, even though it might be determined that under this law the surveyor general would have a claim against the Minnesota Boom Company for the amount of his fees, it cannot be possible that there was any intention to give him a lien upon these logs.

The proposition, tersely put, is that the legistature has authorized the taking of the property of A, for rendering services upon his property and that of B, for the benefit of C., and no such law ever has been, or can be maintained.

*Appleman vs. Myre, 74 Mich., 359*, would seem to be a case directly in point. The question presented in that case was, whether a laborer, working on a large drive of logs consisting of various marks and belonging to different owners, and who has a lien for his services thereon, can enforce that lien *in whole* upon one or more particular marks of logs belonging to one or more of the persons interested in the whole drive. It did not appear that the contract for the driving of the logs was made jointly with the various owners of the logs, and the court said (page 364):

"While this is undoubtedly true that in the enforcement of these liens the laborer may take only a part of the property upon which he has expended labor, and may collect from such part the value of the labor expended upon the whole, yet this must be limited to the labor done upon one owner's logs. He cannot be permitted to seize and subject to his lien the property of one owner to pay for labor expended upon the logs of another owner. These are matters that must be determined at the trial. The plaintiff, on the trial, has the burden of showing how much, or what proportion, of his labor has been expended upon the logs or lumber of each owner, and, this being ascertained, he may have his lien assessed upon such product for the value of labor expended thereon? It appears that there were eight owners or these logs in the drive. Four only were served with process, and appeared in the action. Some testimony was given showing, or tending to show, how many logs each had in

the drive. Several hundred thousand of these logs were not subjected to this lien, nor seized under the writ. The justice was in error in subjecting the logs actually seized to the payment of the debt of the other owners whose logs were not seized. *The property of one man cannot be taken to pay the debt of another unless some fact appears showing some privity of contract between them.*"

And it will be remembered, that defendants' counsel, upon the opening of their case, expressly admitted that there was never any request from anybody to the surveyor general, to scale these logs.

III.

***If the propositions heretofore made in this argument, should be resolved against the plaintiff in error; then it is confidently asserted, that upon this record the defendants have not shown that the defendant Mullen complied with the statutes of the state of Minnesota which, it is pretended, give him a lien on these logs, so as to be entitled to any lien thereon, or any right of possession thereof.***

It is not shown, by any competent evidence, that he ever scaled any of these logs. The only evidence of that fact is the scale bills introduced in evidence, defendants' exhibits 3 and 4.

The only statute that makes these scale bills evidence, is section 2400. This statute, which was enacted in 1877, expressly provides that,

"All scale bills *heretofore* made and signed by any such surveyor general, or the record thereof, in the respective offices of such surveyor general, or copies of such records duly certified, shall be *prima facie* evidence of the matters stated in such scale bill, record or copy."

It will not be contended that without this statute these scale bills would be any evidence of the matters contained in them until verified and shown to be correct, by the men who did the work.

It was argued in the court below, that because section 2403, which is as follows:

"The books of record in the surveyor general's office in each district shall be:

"First. A book in which shall be recorded the log mark of any person desiring to have the same recorded.

"Second. A book in which shall be recorded all bills of sale, mortgages, and orders, and other instruments in writing for the sale, transfer, incumbrance or delivery of any logs or timber in the same district.

Third. A book in which shall be recorded the scale bills of all the logs, timber and lumber surveyed by the surveyor general.

"Fourth. A book, to be kept in ledger form, in which shall be posted and recorded, as soon as any logs or timber is surveyed, separately and under their respective marks, all the logs and timber of each particular mark surveyed, together with the date of scale, the number of logs and the number of pieces of timber, to whom scaled, if to any one, and the number of feet, which book shall be kept posted up so that it will show the matter above stated concerning each mark of logs scaled during each month. And the surveyor general shall make and deliver to any person authorized to demand the same, a certified transcript of said record, as to any mark or marks of logs or timber, upon being paid the fees prescribed in section sixteen of this chapter, and the sum of twenty-five cents for his certificate of the same; and an index of the names and marks contained in each of said books shall also be kept. Any books of the description before named, which have been kept in the office of any such surveyor general and which belong to said office, are hereby declared to be the records of said office, and to have and be of the same validity, force and effect as if the same had been kept by express authority of law. All the books of record hereinbefore mentioned and authorized to be

kept in the office of any surveyor general are hereby declared to be public records, and of as high degree of evidence as the original instrument therein recorded, and shall, in all courts and places in this state, be taken and held to be *prima facie* evidence of the matters therein stated; and such books shall not be removed from the surveyor general's office, but any paper purporting to be a copy of any matter or thing of record in such office, certified under the hand of the surveyor general or his deputy to be a correct transcript from the records in such office, shall, in all courts of this state, be received and read as *prima facie* evidence of the matters and things in such record contained, and of the matters therein stated."

Makes certified copies of any matter or thing of record in the office of the surveyor general, *prima facie* evidence of the matters and things in such record contained, and therefore because a copy of the record of these scale bills—if any such record had ever been made—would be evidence, the original must be evidence.

We have searched diligently for any authority to sustain this proposition, and we can find nothing that comes any nearer to it than this:

If a paper, which in and of itself is evidence, as a contract or a deed, is recorded or authorized by law to be recorded, and the record or a certified copy thereof is made evidence, this does not take away from the paper recorded its original character as evidence, and it is not necessary to produce the record. But this does not establish any such proposition as that already made.

But, if these scale bills are evidence of the scale of these logs, they are nothing more, and the making of these scale bills and delivery thereof to the managing agent at the boom, are only two steps in the performance of the duties prescribed by section 2400.

Section 2400 requires the surveyor general, after having

made the scale of logs as therein directed, at the end of each month to,

"Make out and deliver to the owner of such boom, or the managing agent thereof, a true and correct scale bill, stating the date of such survey, the number of logs and pieces of timber, the marks thereon respectively, and the number of feet of each mark so surveyed during the month *and shall sign the same, and he shall immediately record such bill in the books of his office, and upon being paid his fees for such services, shall deliver the original bill to the owner or managing agent of such boom.*"

Here are certain duties to be performed by the surveyor general in order to entitle him to his fees. He must, in addition to scaling the logs, make out a scale bill showing certain things specified in the statute, and he must, before the delivery of the scale bill to the boom company, record the scale bill in the books of his office. And he must *not* or at least he need not deliver the scale bill to the Boom owner until his fees are paid. Perhaps no better reason can be given for the requirement that he should record the scale bill, than that contained in defendants' answer, where it is alleged that the legislature of the state has duly passed the laws referred to in the answer, requiring the surveyors general to make these scales, "and, furthermore, to keep a true and correct public and official record of all acts done and proceedings had and taken in connection with such scaling" (Printed record page 9).

On the same page it is alleged, that it is for the best interests of the owners of logs, and all persons, firms and corporations interested therein, that they should be gathered together in some safe place, and there assorted, brailed and scaled, "for the purpose, among other things, of ascertaining the amount of merchantable lumber in each log contained, *and keeping a true and correct record*, description and account thereof."

The only possible reason that can be given why a log owner should be required to have his property taken and disposed of to pay the fees for scaling somebody's else logs, for the benefit of still another party, is that after the scaling is

done a record is made which may be of some benefit to the log owner.

Now, it is clear that no such record was ever made of either of these scale bills.

First, and with reference to the May scale bill, exhibit 4, it does not appear from the evidence that what purports to be the record of it, is in fact the record of the whole of it, and as a matter of fact, it is not

Second, as to the June bill, exhibit 3, this pretended record is devoid of all of the requirements of a record. In the first place, there is nothing in it to show that it is a record of a scale bill of the surveyor general of logs and lumber of the fourth district, or that it is a scale bill of logs running out of any chartered boom; all of the original bill that tends to show any such thing, is omitted from this copy. In the next place, it is not a copy. A reference to the original book, exhibit D, which is on file, and a comparison thereof with the copies of the sheets of the original exhibit, which are found from pages 114 to 128 of the printed record, will show that it would be impossible for any man to identify his logs, or to say how many of them, or what quantity of them, were shown upon any one of these pages. Take, for example, sheet 30, page 116 of the printed record; the original bill only shows one column of log marks and figures; the letter press copy shows two columns, and one is just about as plain as the other. Take sheet 33, page 117, the original bill shows only half a column of log marks and figures, while the letter press copy shows two distinct columns. The same thing is true, to almost as great an extent, of sheet 36, page 119, and to a still greater extent of sheet 40, page 121, and sheet 60, page 126. And we submit, with the utmost confidence, that there is nothing in this book which shows that any record whatever of this scale bill, which is worthy of the name of a record, was ever made.

The pages of this same book which were offered, and which are found in the record as defendants' exhibits A 1 and B 1 (page 148 of the printed record) do not in any manner help out the defects in this record; they were utterly incompetent and inadmissible any way, because there is no provision

in the statutes of Minnesota for the recording of any such papers; if they were offered as a record, they are not a record; they are not properly any part of the scale bill, nor of the record of it, and the fact that the surveyor general has copied in his letter press book, a paper which is not authorized to be recorded and which refers to some other paper as a scale, and contains certain statements, cannot aid a defective record of that paper, especially where the defect in the record is of a character that is not at all aided by such a paper. And the defect in this record, in that it fails to show the marks or number of feet scaled, as shown in the original bill, is not in any way aided by any statement in these papers.

Again, section 2402, in providing for the seizure of logs to secure a lien, provides, in substance, that such seizure shall not be made until after the scale bill, together with the notice required to be affixed thereto, shall have been delivered.

Now, it appears from this record, as already stated, that these logs were seized from three or four days to a week before the June scale bill was delivered to the Boom Company, and before either of the notices that a lien was claimed upon the logs (defendant's exhibits 5 and 6) were delivered to the Boom Company. In other words, the surveyor general had taken possession of the property before he had performed the acts which were necessary in order to fix his lien.

And here, again, we are met with the remarkable proposition that A, having performed services for B, and for the benefit of B, upon the property of C, and others, may seize some of the property of C., without notice to C. that B. has not paid for the services—and indeed, without notice to anybody—and subject the property of C to the payment of the whole debt.

If this is not taking property without due, or any, process of law whatever, we cannot imagine a state of facts which would amount to that.

When the defendant Mullen had delivered these two scale bills exhibits 3 and 4, to the owner or managing agent of this boom, he had placed it beyond his power to record the bills, or

to furnish to the plaintiff in error here, or anybody else interested in the logs—except the Boom Company—any information whatever which would be of the slightest benefit to the log owner.

We insist, further, that the remedy for the surveyor general through which he should secure his fees for the scaling done under section 2400 is to retain the scale bill in his own hands until his fees are paid by the Boom Company. It is clear from the section, that the scale bill is made, primarily, for the benefit of the boom owner. It provides that "All boomage of fees of such boom on any logs or timber shall be collected in accordance with such survey." It is of little or no use to anybody else. It furnishes no clue, even if recorded, to the imme diate raft or brail of logs in which those bearing the bark belonging to any individual, are to be found; indeed, upon the trial it was practically admitted, that it would be impossible to find out where (that is, in what brail) logs of a given mark were scaled, without examining in detail every one of the original tally sheets.

It was contended, in the case at bar, that because section 2402 was a part of the same general enactment as section 2400, it should be read in connection with it, and the provisions found in section 2402 for fees and a lien, should be taken and deemed to relate to the fees for scaling under section 2400. We have already pointed out the two different lines of duties in reference to scaling logs by surveyors general, as provided in this general enactment, and cannot subscribe to this proposition.

But, section 2406 of the statutes of 1894, is as follows:

> "No logs shall be scaled by the surveyor general or his deputies, unless the marks upon the said logs are property recorded in accordance with the provisions of this title; and no survey of any logs shall be received in any court in this state except the survey of the surveyor general or his deputy."

This section was section 20 of chapter 32 of the statutes of 1878, and is a part of the same general enactment as the

other sections already quoted. The sections already quoted are found in title 3 of chapter 32 of the revised statutes of 1878 and of 1894. We find no other provision in title 3, for the recording of log marks, except the first subdivision of section 2403 above quoted; but section 27, chapter 32 of the general statutes of 1878, which is now section 2413 of the statutes of 1894, reads as follows:

"Whoever cuts any logs in either of the districts of this state shall, before proceeding to mark the same, cause to be recorded in the office of the surveyor general in whose district such logs may be, a copy of the log mark which is to be put upon said logs, and which mark shall be distinctly different from any other mark recorded in the same district. Whoever cuts any logs in any state adjoining either of the districts of this state, and intends to bring such logs into any such district, may have his log mark recorded in the district into which he intends to bring such logs and into which they may be brought, with the same rights, force and effect as if such logs had been cut in such district. And when any log mark is recorded in pursuance of the provisions of this chapter, such mark shall be deemed and held to be the property of the person in whose name it is recorded; and such mark borne upon any logs or timber, and not superseded by any other mark, shall be *prima facie* evidence that the logs or timber bearing such mark are the property of the person owning the mark. Any such log mark may be sold or transferred by bill of sale recorded in the office of the surveyor general where the mark is recorded, executed by the person in whose name the same is recorded, and a note of such transfer made in the margin of the book where said mark is recorded, or by the order in writing, signed by the person owning such mark, directing the surveyor general to transfer said mark to any person therein named; and upon receipt of such order said surveyor general shall record the same in his office, and transfer said mark upon his books of record of log marks to the person named in said order, upon receiving his fees therefor. And such

sale or transfer of any mark so made shall operate as a sale or transfer of all the logs bearing such mark, and at the time owned by the person transferring the same. Any logs or timber cut in this state, or coming into this state in the first district, at any point on the lake or river St. Croix above the city of Stillwater, the marks of which are not recorded in the district in which they were cut or into which they may come, and all logs or timber not bearing any distinctive mark shall not—in favor of the person who has cut the same or who claims to be the owner thereof—be recognized deemed or held in any of the courts of this state to be the property of any such person for any purpose whatever in any action or proceeding."

It will be seen from a reference to this section, that it is not compulsory upon anybody cutting logs in another state, and bringing them into this state, to record their log marks in this state except where the logs are brought in to the first lumber district.

The plaintiff in error offered to prove by the defendant Mullen, both upon his cross examination, and in rebuttal by calling him as its own witness, that no log marks whatever were recorded in his office, and the testimony was rejected as immaterial.

The defendant Mullen did not think it was immaterial when he interposed his answer, for in that answer he alleged specifically:

> "*That there are and for many months prior to the 17th day of April, 1893, have been and ever since that time have been on file and of record in the office of this defendant, as surveyor general as aforesaid, under and pursuant to the statutes of the state of Minnesota in such case made and provided, several hundred different marks, each of a peculiar and unique character, but distinguishable one from the other and indicating said different ownerships.*"

Upon the trial it was urged that this section 2406 applies to scales made by the surveyor general pursuant to the pro-

visions of section 2397, but certainly, the same argument that would authorize the court in saying that because section 2402 (the section which provides for the fees of the surveyor general and a lien) must be taken to refer and apply to the scale made under section 2400—because it is a part of the same general enactment—would compel the court to say, that under no circumstances should the surveyor general scale any logs unless the log marks were recorded.

Again, plaintiff offered to show that the scale bills offered in evidence (defendant's exhibits 3 and 4) were grossly incorrect (see printed record pages 97, 98, 99, 100, 101, plaintiff's exhibits "E", "F" and "G", and 32nd and 33rd assignments of error).

So that the court may understand this testimony, we make this explanation:

The witness Stewart testified that he made Exhibit F from defendants' exhibits 3 and 4; that is, he selected out of the various marks with the numbers of logs and number of feet set opposite them on either exhibit 3 or 4, the several marks with the numbers of logs and feet set opposite them in Exhibit F; and a reference to exhibits 3 and 4 (the originals of which are on file) will show this to be true. This exhibit F shows (for example) that—as appears from defendants' exhibit 4—on the 22nd day of June, 2,789 logs containing 344,950 feet, and marked J N, were scaled by Mullen; and that—as appears from defendants' exhibit 3—on the 23rd day of May, 1,124 logs containing 176,460 feet and marked Y Z, were scaled by Mullen. Plaintiff proved by Yates and Sinclair, that these marks were not recorded in their offices (printed record page 101, plaintiff's exhibit "G" page 146, printed record 97, and plaintiff's exhibit E, page 144); and offered to prove by Mullen that none of these marks were recorded in his office; and by Stewart, who had kept the log books at West Newton and Beef Slough, that he never saw any such marks (printed record pages 98-9); and by Phitts, whose duty it was to know and see every mark going through the boom, and direct where it should go, that he never saw any such marks (printed record pages 99-100); and by Daly, who was Mullen's chief deputy in charge of his scalers, that they

were an inexperienced lot who did not, and could not, make a correct scale (printed record pages 100-101.)

The scale bills (exhibits 3 and 4) are at best only *prima facie* evidence; *sec. 2400 supra*; and it is remarkable if plaintiff's logs can be charged with a lien for scaling logs that did not exist upon such *prima facie* evidence, when the evidence is at hand and offered to show errors amounting, in exhibit 4, to over 730,000 feet, and in exhibit 3, to over 390,000 feet.

Plaintiff also offered to show by the witness McMillan, that the scaling was not done as required by the laws of Minnesota (printed record pages 101-2). The statute of Minnesota prescribing the manner in which logs shall be scaled, was at the time this scaling was done, sections 12 and 13, chapter 32, G. S. 1878—now sections 2398 and 2399 statutes of Minnesota 1894. These sections read as follows:

> "Section 2398. Rules for surveying—Record of survey.
>
> "The said surveyors and their deputies shall, in surveying or measuring logs or lumber, make such allowance for hollow, rotten and crooked logs as would reduce and make them equal to good, sound and straight merchantable logs; and in surveying lumber, shall throw off all rotten, shaky or wany stuff, and make the same equal to good merchantable lumber. And the figures showing such survey shall, at the time of making the same, be entered by the surveyor in pass-books kept for the purpose, which books shall be preserved and filed by the surveyor general in his office, for the inspection of all persons interested therein."
>
> "Section 2399. Written rule to be posted—Scribner's rule adopted.
>
> "The surveyor general shall keep posted in his office a written rule or scale of logs of all sizes and lengths, which shall govern him in his surveys, and the scale-rule known as Scribner's rule is hereby adopted as the only legal rule for the survey of logs in this state;

provided, that every log shall be surveyed by the largest number of even feet which it contains in length over ten feet and under twenty-four feet, and all logs of twenty-four feet in length or more shall be surveyed as two logs or more."

The evidence offered would have shown that this law was not complied with.

To recapitulate the argument on this branch of the case:

1. There was no competent evidence that the logs were in fact scaled. Exhibits 3 and 4 were not evidence of that fact under the provisions of Sec. 2400, and that is the only law making them evidence. And exhibits 5 and 6 are not evidence of anything under any statute (assignments of error Nos. 5, 6, 7 and 8).

2. Plaintiff should have been permitted to show that there was never any authority to scale these logs because the log marks were never recorded in Mullen's office (assignments of error 9 and 31).

3. Mullen did not so perform his duties as to entitle him to a lien in that he never recorded the scale bills (Subd. b and d, 42nd assignment of error, and 41st assignment.)

4. The statute does not give a lien on logs of a private party for scaling logs running through a boom; hence it was error to admit any evidence of scaling them, and judgment should have been ordered for plaintiff (assignments of error 5, 6, 7, 8 and 13).

5. The only remedy for Mullen to recover his fees, was by retaining the scale bills until the Boom Company paid him. Hence, he could have no lien on or right to plaintiff's logs (13th assignment of error).

6. The plaintiff should have been permitted to show the gross inaccuracies in the scale bills, and that they were not made as required by law (assignments of error 32, 33, 34, 35 and 36).

IV.

***If the booms at West Newton were chartered booms, within the meaning of section 2400, and if the defendant had properly scaled the logs that ran through it, had recorded his scale bill and had otherwise complied with the statute, and if, by the terms of this law, the surveyor general would be entitled to a lien upon this property for his fees for making such scale and recording, then we insist that the law, as applied to this locality, is a regulation of interstate commerce, which the legislature of the state of Minnesota has no authority whatever to make.***

It is too clear for argument, that the logs passing through these booms are subjects of interstate commerce, and of nothing else.

*McCall vs. California, 136 U. S. 104.*

The definition of commerce, as laid down by Prof. Pomeroy in his constitutional law, section 378, is adopted; this definition is as follows:

> "It includes the fact of intercourse and of traffic, and the subject matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the means, instruments and places by and in which intercourse and traffic are carried on; and further, still, comprehends the act of carrying them on at these places, and by and with these means; the *subject matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons.*"

In *County of Mobile v. Kimball, 102 U. S., 691* it is said that

> "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms *navigation*, and the transportation *and transit* of persons and *property.*"

In *Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196-203*, the definition is:

"Commerce among the states consists of intercourse and traffic between their citizens, *and includes the transportation of persons and property, and the navigation of public waters for that purpose.*"

And all these cases are cited with approval in the late case of,

*United States v. E. C. Knight Company, 156 U. S. 1,* where the court say:

"What is commerce among the states? The decisions of this court fully answer the question, commerce undoubtedly, is traffic, but it is something more, it is intercourse. It does not embrace the completely interior traffic of the respective states—that which is 'carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states'—but it does embrace 'every species of commercial intercourse' between the United States and foreign nations and among the states, and, therefore, it includes such traffic or trade, buying, selling, and interchange of commodities, as directly affects or necessarily involves the interests of the people of the United States. 'Commerce, as the word is used in the Constitution, is a unit,' and 'cannot stop at the external boundary line of each state, but may be introduced into the interior.' 'The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, *and to those internal concerns which affect the states generally.*"

"These principles were announced in Gibbons v. Ogden, and have often been approved. It is the settled doctrine of this court, that interstate commerce embraces something more than the mere physical transportation of articles of property, and the vehicles or vessels by which such transportation is affected. In County of Mobile v. Kimball, 102 U. S. 691,702, it was said that 'commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic

> *including, in these terms, navigation and the transportation and transit of persons and property, as well as* the purchase, sale, and exchange of commodities." In Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, the language of the court was: 'Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, *and the navigation of public waters for that purpose*, as well as the purchase, sale, and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties or other exactions."

None of the logs which came into these booms had ever become a part of the common mass of property in the state of Minnesota until after they were assorted, rafted and delivered to their respective owners—if they ever did. They were brought down to these booms out of the state of Wisconsin, in a common mass, and there stopped for the express purpose—and only for the purpose—of assorting the same out according to their several ownerships, putting them into rafts and fitting them for transportation down the Mississippi river.

There is absolutely no evidence worthy of mention, in these cases, that a single log ever got into these booms that came from the state of Minnesota.

The plaintiff has introduced exhibit 9, from which it appears that three different log marks were recorded in the office of the surveyor general of the second district before the year 1893, which log marks are found in the brails of logs belonging to the plaintiff in this case, but there is no evidence that any logs bearing any of these marks ever went below Minneapolis; and the evidence is overwhelming, that many logs bearing these marks, and each of them, came out of the Chippewa river; and this evidence is supplemented by the fact that these log marks were recorded upon the Chippewa River (printed record pages 147-8, plaintiff's exhibits H & I).

The plaintiff also offered further proof on this point, which was rejected. (See printed record pages 57-8, assignments of error XV and XVI, page 155, and printed record page 102, and assignments of error XXXVII and XXXVIII, pages 163-4.)

This evidence would have effectually disposed of any lingering doubt as to this question of fact.

It is true that there is some evidence, that in towing rafts of logs down the Mississippi river, some logs escape from rafts, and it is possible that the inference has been raised, that some of these logs that escape from the rafts had at times gotten into these booms, *but these logs which escape from these rafts are equally subjects of interstate commerce with the logs which come down the Chippewa River;* all of the logs which escaped from these rafts have been scaled and delivered to their respective owners, and they have received their pay for them; they have sold them to parties engaged in manufacture down the river, and those parties, or their agents, are engaged in towing them past these booms. This traffic is equally as much interstate commerce, as the traffic of floating the logs out of the state of Wisconsin into and through the state of Minnesota, and while in the state of Minnesota, detaining them for the purpose of assorting.

Again, it appears conclusively, that the power to identify these logs by their marks as belonging to any particular owners, is gone when they have been rafted, and different rafts, containing the same marks, sold to different purchasers. See, as to the Mississippi River logs, testimony of Richard Chute, (printed record page 80), where he says:

"I was manager of the Mississippi River Lumber Company. Eventually the logs of that company went to points down the river to various parties; they were rafted without sorting; they were put together just as they were in the boom without putting on any particular mark. If the Mississippi River Lumber Company sold these rafts or these brails of logs to different parties or individuals, then different parties or

individuals had the same mark of logs that they took down the river."

And, as to the St. Croix river logs, the testimony of H. J. McKusick (printed record page 85) where he says:

"After being rafted they were sorted and rafted and scaled and they were delivered to the members of the firm comprising the Musser-Sauntry Company, and about two-thirds of the total amount was taken down to the mills in Iowa and Illinois of Weyerhaeuser & Denkman and Dimmock, Gould & Company, and some to the Musser Lumber Company of Muscatine. The balance was sold on a log scale and went to other points Musser-Sauntry logs were all put together. They rafted with reference to their own logs. For instance, Musser & Sauntry would have half a dozen different marks; they were all rafted together, these half dozen marks; then when these different members of the company took away logs Weyerhaeuser would take some of the same marks that Dimmock, Gould & Company did. Musser-Sauntry logs were sold to different buyers, mostly down river parties having mills located along the river. Mostly sold to saw mills located on the Mississippi river in Iowa and Illinois and some in Missouri. *That was generally true of all logs I handled there. I think it is generally true of all logs that are taken below.*"

If these logs, or the ownership thereof can not be identified by their marks, then there can be no purpose to be served, or object to be attained, by the scale attempted to be made by the defendant Mullen, except to impose a burden upon interstate commerce, and the imposition of any such burden, in any form, is expressly prohibited by the provisions of the constitution of the United States, as construed by this court.

In the leading case of,

*Wabash etc. Railway Company v. Illinois, 118 U. S. 557,* on page 571, Mr. Justice Miller, delivering the opinion of the court, after considering many cases, says:

> "But we think it may safely be said, that state legislation which seeks to impose a direct burden upon

interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position; it does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without, or goes out from within; while it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent, in the management of his business throughout his entire voyage. It was to meet just such a case, that the commercial clause in the constitution was adopted. The river Mississippi passes through or along the borders of ten different states, and and its tributaries reach many more; the commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers, while within its jurisdiction, the confusion likely to follow, could not but be productive of great inconvenience and unnecessary hardship."

This case has never been questioned, and its scope has been extended to almost every kind of commerce between the states.

*Robbins v. Shelby County taxing District, 120 U. S. 489.*

*Fargo v. Michigan, 121 U. S. 230.*

*Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326.*

*Railroad Co. v. Husen, 95 U. S. 465.*

*Bowman v. Railway Co. 125 U. S. 465.*

*Le Loup v. Mobile, 127 U. S. 640.*

*Asher v. Texas, 128 U. S. 129.*

*Stontenberg v. Hennick, 129 U. S. 141.*

*W. U. Tel. Co. v. Alabama, 132 U. S. 472.*

*McCall v. California, 136 U. S. 104.*

*Norfolk R. R. Co. v. Pennsylvania, 136 U. S. 114 (reversing S. C. 114 Pa. St. 256).*

*Lyng v. Michigan, 135 U. S 161.*

*Crutcher v. Kentuckey, 141 U. S. 47.*

*Brennan v. Titusville, 153 U. S. 289.*

*Pollock v. Farmers L. & T. Co. 157 U. S. 429.*

It was forcibly urged in the court below, and doubtless will be here, that this law is an inspection law which is excepted from the prohibition imposed upon the states, from regulating commerce. No better definition of an inspection law exists, than that of Chief Justice Marshall, in

*Gibbons v. Ogden, 9 Wheaton, 1-203,* and the definition has been quoted and followed in many subsequent cases, notably in,

*Bowman v. Railway Co. 125 U. S. 465,* where this court said:

> "The object of inspection laws", said Chief Justice Marshall in *Gibbons v. Ogden, 9 Wheaton 1, 203,* "is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. *They act upon the subject, before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose.*" They are confined to such particulars as, in the estimation of the legislature, and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving to the purchaser public assurance that the article is in that condition, and of that quality, which makes it merchantable and fit for use or consumption."

*Railroad Compauy v. Husen, 95 U. S., 465,* where the court, on page 472, said:

> "While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under con-

tagious or infectious diseases, or convicts, etc., from entering the state; while, for the purpose of self protection it may establish quarantine and reasonable inspection laws, *it may not* interfere with transportation into or through the state, beyond what is *absolutely necessary for its self protection.* It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. * * * * * The reach of the statute was far beyond its professed object, and far into the realm which is within the exclusive jurisdiction of Congress. * * * * * * The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope, cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

And as to *when*, and upon what subject such laws may be enacted and applied, see,

*Robbins v. Shelby Taxing Dist., supra, where the court say:*

"The state may, notwithstanding this constitutional provision, by virtue of its jurisdiction over persons and property within its limits * * * pass inspection laws to secure the due quality and measure of products and commodities. * * * * But, in making such internal regulations, a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; *nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein.*

"In a word, it may be said, that in the matter of interstate commerce, the United States are but one country, and are and must be subject to one system of

regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject."

Some cases cited by counsel in the court below to sustain their contention, ought perhaps to be noticed.

*Woodruff v. Parham, 8 Wall. 123.* This case holds:

> "The term 'import' as used in that clause of the constitution which says that 'no state shall levy any imposts or duties on *imports* or exports,' does not refer to articles imported from one state into another, but only to articles imported from foreign countries into the United States. Hence, a uniform tax imposed by a state on *all* sales made in it, whether they be made by a citizen of it or a citizen of some other state, and whether the goods sold are the produce of that state enacting the law or of some other state, is valid."

It is to be noted, that the term 'imports' which is here construed, occurs in another provision of the constitution, and it may well be doubted whether the doctrine of this case can be applied to the question as to what constitutes interstate commerce; but if it can, the case must be considered as overruled by the cases of,

*Bowman v. Railway Co. supra and Leisy v. Hardin, 135 U. S. 100.*

In this latter case, Mr. Chief Justice Fuller states the question to be as follows:

> "Being thus articles of commerce, can a state, in the absence of legislation on the part of Congress, prohibit their importation from abroad *or from a sister state?* Or when imported prohibit their sale by the importer? If the importation cannot be prohibited without the consent of Congress, when does property imported from abroad or *from a sister state,* so become part of the common mass of property within a state as to be subject to its unimpeded control?"

And the syllabus shows the conclusion reached by the court.

*Gibbons v. Ogden, 9 Wheaton 1.*

It was contended in the court below, that this case decides that in the absence of congressional action, the states may pass laws which operate as regulations of interstate commerce. We think it may well be doubted whether the case warrants any such conclusion; but if it does, it is not now the law as to this proposition and has not been since the decision in,

*Wabash etc. Ry. Co. v. Illinois, 118 U. S. supra.* See further on this point:

*Robbins v. Shelby County taxing Dist. supra;*

*Bowman v. Railway Co. supra;*

*Leisy v. Hardin, supra;*

*Brown v. Houston, 114 U. S. 622,* must be considered overruled as is *Woodruff v. Parham, supra,* upon the first proposition, if it is claimed it applied to the clause of the constitution now under consideration. And, upon the proposition that a tax on interstate commerce, in order to be bad must discriminate against the articles imported, or the business of carrying on such commerce, this case is certainly overruled by,

*Robbins v. Shelby County Taxing Dist.,* and its kindred cases above cited.

*Turner v. Maryland, 107 U. S.* The law there in question answered the definition of an inspection law given in Gibbons v. Ogden, because it operated upon tobacco grown in Maryland before it became an article of commerce. This is clear, not only from a reading of the law, but from the opinion of the court upon pages 48, 49, 50, 56, 57 and 58, and the court winds up its opinion by saying, that no inspection is involved except that of tobacco grown in Maryland, and that the court must not be understood as expressing any opinion as to any provision of the Maryland laws which refer to the inspection of tobacco grown out of Maryland; and in,

*Voight v. Wright, 141 U. S., 62,* it is said, that the question is still open as to the mode and extent in which state in-

spection laws can constitutionally be applied to personal property imported from abroad, or from another state.

*Pittsburgh & Southern Coal Co. v. Louisiana, 156 U. S. 590.*

This case is distinguishable from the case at bar, because the statute there under consideration only provided for the measurement of the cargoes *when they were sold.* It did not authorize the inspectors to inspect *every* boat, or any boat *unless it was sold*, or unless requested by the owner. In the case at bar the right is sought to be established to measure and charge, indiscriminately, every log, no matter whether sold in the state or not, or whether the owners request it or not. Indeed, two-thirds of the logs are owned by the same parties who owned the boom, (printed record page 56) and the assorting is a mere division between themselves of their property, while it is in process of transportation.

*Pittsburgh Coal Co. v. Bates, 156 U. S. 577.*

That case is clearly distinguishable from the case at bar, because in that case the property sought to be taxed had arrived at the state of its ultimate destination. See the language of the court in this case, on page 588, where it is said:

> "And it was held, that as to the character and mode of the assessment it was not a tax imposed upon the coal as a foreign produce or as the product of another state than Louisana, nor a tax imposed by reason of the coal being imported or brought into Louisana, *nor a tax imposed whilst it was in a state of transit through that state to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the State, and as such it was taxable for the current year as all other property in the city of New Orleans was taxable."*

*Neilson v. Garza, 2 Woods, 287.*

If this case could be said to be an authority upon the question here under consideration, its weight would be very much lessened by the fact that it proceeds on the false assumption, that in the absence of congressional legislation, the state may pass laws which have the effect to regulate interstate commerce. But the case is distinguishable upon another ground: There, the goods were brought into the state and left there, and liable to become intermingled with the property of citizens of Texas, so that frauds might occur in their exportations. No such condition of things exists here. As already shown, the logs here in question were shipped in Wisconsin to plaintiff's mills in Davenport; there was no probability—hardly a possibility—of their ever becoming intermingled with the property of citizens of Minnesota, or with property that had ever become a part of the common mass of property in Minnesota; at least until after such property had been segregated from the common mass and again become itself a subject of interstate commerce.

*Patapsco &c. Co. v. Board of Agriculture, 52 Fed. 690.*

The law under consideration was not in any sense an inspection law, but it was a part of a law which did provide for the inspection of goods brought into the state for sale, "to fit them for domestic use," and answers the definition in Gibbons v. Odgen. And the law or particular section of the law—under consideration in that case—was considered entirely upon the proposition, whether it imposed an unreasonable tax upon importers.

It appeared from plaintiff's evidence in rebuttal—and which was not contradicted—that no logs came into the Mississippi river above the mouth of the Chippewa, except,

1. Such as are cut and put into the Mississippi river and its tributaries above Minneapolis (printed record pages 92 and 93). These logs are all assorted, either at the booms of the Mississippi and Rum River Boom Company at and immediately above Minneapolis; or at the booms of the St. Paul Boom Company, immediately below St. Anthony Falls. Those that are assorted at the upper booms, are delivered to their sever-

al owners there and manufactured into lumber at Minneapolis. Those that are turned over the falls, and assorted at the lower booms, are put into rafts and towed down the river to various points, many of such rafts passing the West Newton Booms. In either case, as fast as they are assorted, they are scaled by the surveyor general of the fourth lumber district, and every log accounted for to its rightful owner (see evidence of B. F. Nelson, printed record pages 76-7, and Richard Chute printed record pages 79-80).

2. Such are cut on the St. Croix and its tributaries above Stillwater (printed record pages 92-3). These logs are all gathered together in the booms of the St. Croix Boom Corporation, just above that part of the river known as Lake St. Croix, and there assorted and delivered to their various owners. After being assorted, and before a log is manufactured or taken out of the lake, they are scaled and accounted for to their owners by the Surveyor General of the first district, such scale being required by Section 2411 of the statutes of 1894, which applies only to the first district (see testimony of Chas. A. Staples, printed record pages 81-2, and Samuel McClure, printed record pages 82-3). About two-thirds of the logs cut on the St. Croix, are rafted and taken to points below on that river, and on the Mississippi River, many of such rafts passing West Newton booms (see same testimony).

It further appeared from the evidence of all these witnesses, and some others that it would be a practical impossibility for any of these logs to get through either Lake St. Croix or Lake Pepin loose, that is, unless they were fastened in rafts and towed through.

It is therefore to be observed, that, the three great sources of log supply for the Mississippi river market, are,

1, The pine lands upon that river and its tributaries above Minneapolis, *all* of which are in the state of Minnesota, and the logs cut from which are always a part of the common mass of property in the state until assorted, scaled and put into rafts and started down the river destined to points out of the state.

2, The pine lands upon the St. Croix river and its tributaries part of which are in Wisconsin, and a part in Minnesota; but all

the logs cut from these lands must, before they can be ass orted, become intermingled in a common mass, and therefore, in order to preserve the evidence of individual ownership, a public scale and record thereof is proper and is in fact made; and,

3, The pine lands upon the Chippewa and its tributaries, *all* in the state of Wisconsin, and the logs cut from which do not become intermingled with any of the common mass of property in Minnesota, and have never, prior to 1889, been brought into Minnesota in an intermingled mass. The present controversy involves this class of logs only.

It is insisted, therefore, that as to this latter class of logs, they are at all times subjects purely of interstate commerce while passing through Minnesota, or being detained therein for the sole purpose of being assorted and delivered to their respective owners, and are not in any sense subject to the action of inspection laws, the object of which, and the subjects upon which they can act; are so clearly defined in,

*Bowman v. Ry. Co. supra.*

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